Supreme Court, U.S.
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No. -

In The

# Supreme Court of the United States

DANIEL ROBINSON; et al. ("Class I");
*Petitioners/Defendants*,

vs.

ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEE'S STOCK OWNERSHIP &
PROFIT SHARING PLAN et al.
*Respondents/Plaintiffs*,

and

SHARON BALDOCK; et al. ("Class II")
*Respondents/Defendants*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## Questions Presented

I.
A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Whether a Plan Administrator's Decision May be Upheld on Grounds Other Than Those Given or Considered by the Plan Administrator Regardless of the Standard of Review.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

**Parties to Proceedings Below**

DANIEL ROBINSON; MIKE DOMINQUEZ; WILLIAM SKINNER; LISA MOORE; CHERYL ELLIOTT; RICKY TAYLOR; JERRY WAYNE MASSEY; JAMES BARNES; SUE COOKE; RALPH DAVIS JONES; SCOTT LYONS; VICKI HARDENBURG; TIM CARROLL; BENNY HOUSEHOLDER; RANDY NEIL GARNER; BENJAMIN WILLIAMS; STEVEN WAYNE BLAIR; ROBERT MARKWALTER; LISA BOYER; SAMUEL ADAMS; JERRY HANCOCK, on behalf of themselves and all other similarly-situated individuals, ("Class I")

Petitioners/Defendants

vs.

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEE'S STOCK OWNERSHIP & PROFIT SHARING PLAN; WILLIAM J. BARRINGTON, in their capacities as members of the Administrative Committee; DIANNE M. YACONETTI, in their capacities as members of the Administrative Committee; WILLIAM R. MCMANAMAN, in their capacities as members of the Administrative Committee

Respondents/Plaintiffs

and

SHARON BALDOCK; MARK LINDEMAN; EARL WAYNE HUMPHRIES; JEAN MARIE HOWARTH; WILLIAM SULLIVAN; ROY ELLIS; ARVIL ELLIS; GARY SOUTHWOOD; KENNETH HARRELL; EMILY SCHULTZ; FOREST JOSLIN; DEBORAH MCDANIEL, on behalf of themselves and all other similarly-situated individuals, ("Class II")

Respondents/Defendants

## Table of Contents

Questions Presented ..... i

Parties to Proceedings Below ..... ii

Table of Authorities ..... vi

Citations to Opinions and Orders ..... 1

Corporate Disclosure Statement ..... 1

Statement of Jurisdiction ..... 1

Statutes and Regulations ..... 2

Statement of the Case ..... 4
Basis for Original Subject Matter Jurisdiction ..... 4
Statement of Facts ..... 6

Argument ..... 9
I. A. Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard. ..... 9

I.B. Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred. . . . 14

I.C. Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator. . 18

Conclusion to Question I ..... 20

II. Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred. ..... 21

Conclusion ..... 27

## Table of Authorities

Cases

***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981 (6th Cir. 1999) ..... 1, 12

***Anderson v. Great West Life Assur. Co.***, 942 F.2d 392 (6th Cir. 1991) ..... 17

***Bogue v. Ampex Corp.***, 976 F.2d 1319 (9th Cir. 1992), ***cert. den.*** 507 U.S. 1031 (1993) ..... 10

***Bruch v. Firestone Tire & Rubber Co.***, 828 F.2d 124 (3rd Cir.1987), ***aff'd in part, rev'd in part***, 489 U.S. 101 (1989) ..... 15

***Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.***, 472 U.S. 559 (1985) ..... 12

***Chait v. Bernstein***, 835 F.2d 1017 (3d Cir. 1987) ..... 22

***Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984) ..... 15

***Cox v. Mid-America Dairyman, Inc.***, 965 F.2d 569 (8th Cir. 1992) ..... 16

***DeFelice v. American International Life***, 112 F.3d 61 (2nd Cir. 1997) ..... 18

***Donatelli v. Home Ins. Co.***, 992 F.2d 763 (8th Cir. 1993) ..... 19

***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989) ..... i, 9-11, 13-17

***Gauer v. Connors***, 953 F.2d 97 (4th Cir. 1991) ..... 14

***Gluck v. Unisys Corp.***, 960 F.2d 1168 (3d Cir. 1992) ... 22

***Halliburton Co. v. C.I.R.***, 100 T.C. 216 (1993), ***aff'd***, 25 F.3d 1043 (5th Cir. 1994), ***cert. denied***513 U.S. 989 (1994) ..... 20, 22, 25, 26

***Heasley v. Belden & Blake Corp.***, 2 F.3d 1249 (3rd Cir. 1993) ..... 10

***Heidgerd v. Olin Corp.***, 906 F.2d 903 (2nd Cir. 1990) ... 16

***Hickey v. A. E. Staley Mfg.***, 995 F.2d 1385 (7th Cir. 1993) ..... 10

***Hullett v. Towers, Perrin , Forster & Crosby, Inc.***, 38 F.3d 107 (3rd Cir. 1994) ..... 10

***Hunt v. Chromartie***, ___ U.S ___, 67 U.S.L.W. 4306 (1999) ..... 21

***In re Gulf Pension Litigation***, 764 F. Supp. 1149 (S.D. Tex. 1991),***aff'd sub nom., Borst v. Chevron Corp.***, 36 F.3d 1308 (5th Cir. 1994), ***cert. den.*** 514 U.S. 1066 (1995) ..... 24

***Kearney v. Standard Insurance Co.***, ___ F.3d ___ (9th Cir. 1999) (en banc) ..... 10

***Kirwan v. Marriott Corp.***,
10 F.3d 784 (11th Cir. 1994) ..... 10, 13

***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***,
833 F.2d 74 (6th Cir. 1987) ..... 23, 25

***Luby v. Teamsters Health, Welfare, and Pension Trust Funds***, 944 F.2d 1176 (3d Cir.1991) ... 16, 19

***Lynd v. Reliance Standard Life Ins. Co.***, 94 F.3d 979
(5th Cir. 1996) ..... 10

***Masella v. Blue Cross & Blue Shield of Connecticut, Inc.***, 936 F.2d 98 (2d Cir. 1991) ... 19

***Matsushita Electric Industrial Co. v. Zenith Radio***,
475 U.S. 574 (1986) ..... 25

***Meditrust Financial Services Corp. v. The Sterling Chemicals, Incorporated, Medical Benefits Plan for Hourly-paid Employees***, 168 F.3d 211 (5th Cir. 1999) ..... 16

***Mertins v. Hewitt Associates***, 508 U.S. 248 (1993) ..... 14

***Moon v. American Home Assurance Co.***,
888 F.2d 86 (11th Cir. 1989) ..... 19

***Morales v. Pan American Life Ins. Co.***,
718 F.Supp. 1297(E.D.La. 1989),
***aff'd.***, 914 F.2d 83 (5th Cir. 1990) ..... 22

***New York State Conference of Blue Cross Plans v. Travelers Ins. Co.***, 514 U.S. 645 (1995) ..... 20

***Oldenberger v. Central States Southeast and Southwest Areas Teamster Penion Fund***, 934 F.2d 171 (8th Cir. 1991) . . . . . 10

***Paramore v. Delta Airlines***, 129 F.3d 1446 (11th Cir. 1997) . . . . . 16, 17

***Penn v. Howe-Baker Engineers, Inc.***, 898 F.2d 1096 (5th Cir. 1990) . . . . . 14

***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550 (6th Cir. 1998) (en banc) . . . . . 9, 10

***Perry v. Simplicity Eng'g*** , 900 F.2d 963 (6th Cir. 1990) . . . . . 18

***Pierre v. Connecticut Gen. Life Ins.***, 502 U.S. 973 (1991) . . . . . 15

***Pierre v. Connecticut General Life Ins. Co.***, 932 F.2d 1552 (5th Cir.),***cert. denied***, 502 U.S. 973 (1991) . . . . . 16

***Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust***, 920 F.2d 651 (10th Cir. 1990) . . 14

***Queisinberry v. Life iNs. Co. of North America***, 987 F.2d 1017 (4th Cir. 1993) . . . . . 16, 19

***Ramsey v. Hercules Inc.***, 77 F.3d 199 (7th Cir. 1996) . . . 16

***Reinking v. Philadelphia American Life Ins. Co.***, 910 F.2d 1210 (4th Cir.1990) . . . . . 16

***Rowan v. Unum Life Ins. Co. of America***, 119 F.3d 433 (6th Cir.1997) . . . . . 16

***Sandoval v. Aetna Life & Casualty Ins. Co.***,
967 F.2d 377 (10th Cir.1992) . . . . . 18

***Snow v. Standard Ins. Co.***, 87 F.3d 327 (9th Cir. 1996) . 10

***St. Mary's Honor Center v. Hicks***, 509 U.S. 502 (1993)
. . . . . 13

***Sure-Tan, Inc. v. NLRB***, 467 U.S. 883 (1984) . . . . . 25

***Terry v. Bayer Corp.***, 145 F.3d 28 (1st Cir. 1998) . . . . . 10

***Varity Corp. v. Howe***, 516 U.S. 489 (1996) . . . . . 9, 13

***Weil v. Retirement Plan Admin. Comm.***,
913 F.2d 1045 (2nd Cir. 1990), on petition
for rehearing, 933 F.2d 106 (2nd Cir. 1991) . . 14, 15

***Wheeler v. Dynamic Engineering, Inc.***, 62 F.3d 634
(4th Cir. 1995) . . . . . 10

***Wildbur v. Arco Chemicals***, 974 F.2d 631
(5th Cir. 1992) . . . . . 16

***Wilkins v. Baptist Healthcare System, Inc.***, 150 F.3d 609
(6th Cir. 1998) . . . . . 18

***Wulf v. Quantum Chem. Corp.***, 26 F.3d 1368
(6th Cir. 1994), ***cert den***. 513 U.S. 1058 (1994) . . 13

Statutes, Regulations and Other Authorities

26 C.F.R. § 1.411(d)-2(b)(1) ..... 22

26 C.F.R. § 1.401-6 ..... 2

26 C.F.R. § 1.411(d)-2(b)(1) ..... 2

26 U.S.C. § 401(a) ..... 6

26 U.S.C. § 411 ..... 6

26 U.S.C. § 411(d)(3) ..... 2, 6, 26

26 U.S.C. § 4975(e)(7) ..... 6

29 U.S.C. § 1132(a)(1)(B) ..... 9, 15

Bogert & G. Bogert, LAW OF TRUSTS AND TRUSTEES 552 (2d rev. ed. 1980) ..... 14

Employee Retirement Income Security Act of 1974 Pub. L. 93–406 ..... 6

Grant, Note, ***Battling for ERISA Benefits in the Ninth Circuit: Overcoming Abuse of Discretion Review***, 28 SOUTHWESTERN UNIVERSITY LAW REVIEW 93, 99 (1998) ..... 15

Heyl, Note, ***Bedrick v. Travelers Insurance Co.: The Fourth Circuit's Continued Attempt to Work with the "Doctrinal Hash" of the Standard of Review in ERISA Benefit-Denial Cases***, 75 NORTH CAROLINA L. REV. 2382, 2406-07 (1997) ..... 18

JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998 ..... 20

PENSION PLAN GUIDE ¶ 5920 (CCH 1998) ..... 11

Pub L. 103-66, § 13161 ..... 8

Pub. L. 101-508, Sec. 11221 ..... 8, 24

Restatement (Second) of Trusts 174, comment c (1959) ..... 14

S. Rept. 93-383 (1973) ..... 23

## Citations to Opinions and Orders

The decision of the United States Court of Appeals for the Sixth Circuit is reported as ***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981 (6th Cir. 1999), and is reprinted in the appendix to this petition at Apx. 1-15. The March 11, 1999, Order denying Class I's petition for rehearing and suggestion of rehearing en banc is not yet reported but is reprinted in the Appendix at Apx 94-95. The Memorandum and Order of the district court dated July 7, 1997 is reprinted in the Appendix at Apx. 16-19. The Report and Recommendation of the Magistrate Judge dated October 30, 1996, is reprinted in the appendix at Apx. 20-88. The Memorandum and Order of the District Court dated April 13, 1993, certifying two defendant classes is reprinted in the Appendix at Apx. 89-93.

## Corporate Disclosure Statement

In accordance with Supreme Court Rule 29.6, the petitioners are not a nongovernmental corporation but a conditionally certified class of individuals formerly employed by Sea Ray boats. Apx. 89-93.

## Statement of Jurisdiction

The United States Court of Appeals for the Sixth Circuit entered judgment on January 15, 1999, and denied the Class I Defendants-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc on March 11, 1999. Apx. 94. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**Statutes and Regulations**

26 U.S.C. § 411(d)(3), provides that:

> Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that -
>
> (A) upon its termination or partial termination, . . .
>
> > the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 C.F.R. § 1.411(d)-2(b)(1) provides that:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

26 C.F.R. § 1.401-6 provides that:

> (a) General rules. (1) In order for a pension, profit-sharing, or stock bonus trust to satisfy the

requirements of section 401, the plan of which such trust forms a part must expressly provide that, upon the termination of the plan or upon the complete discontinuance of contributions under the plan, the rights of each employee to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to his account at such time, are nonforfeitable. As to what constitutes nonforfeitable rights of an employee, see paragraph (a)(2) of Sec. 1.402(b)-1.

* * *

(b) Termination defined. (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees. However, a plan is not terminated, for example, merely because an employer consolidates or replaces that plan with a comparable plan. Similarly, a plan is not terminated merely because the employer sells or otherwise disposes of his trade or business if the acquiring employer continues the plan as a separate and distinct plan of its own, or consolidates or replaces that plan with a comparable plan. See paragraph (d)(4) of Sec. 1.381(c)(11)-1 for the definition of comparable plan. In addition, the Commissioner may determine that other plans are comparable for purposes of this section.

(2) For purposes of this section, the term termination includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a

group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, will be determined on the basis of all the facts and circumstances. Similarly, whether or not a partial termination occurs when benefits or employer contributions are reduced, or the eligibility or vesting requirements under the plan are made less liberal, will be determined on the basis of all the facts and circumstances. However, if a partial termination of a qualified plan occurs, the provisions of section 401(a)(7) and this section apply only to the part of the plan that is terminated.

## Statement of the Case

### Basis for Original Subject Matter Jurisdiction

The district court possessed subject matter jurisdiction over this case because the complaint filed by the Respondents raised a federal question under the Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1132(e). Jurisdiction is also proper under 28 U.S.C. § 1331, because this case raises a federal question involving the interpretation and application of the Internal Revenue Code, as amended by § 1012 of ERISA. 26 U.S.C. §411(d)(3).

This action was filed in the United States District Court for the Eastern District of Tennessee on August 25, 1992, by the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan and the three members thereof. (the "Committee"). Respondents sought a declaratory judgment that there had been no partial termination of the an Employee Stock Ownership and Profit Sharing Plan (ESOP), within the meaning 26 U.S.C. § 411(d)(3), as amended by the

Employee Retirement Income Security Act of 1974 ("ERISA"), and the terms of the Plan. Apx. 16.

By order of the district court, two defendant classes of former and present participants were defined. Petitioners, Class I, consisted of all former Sea-Ray employees who were participants in the plan, and whose service as employees ended between July 1, 1989, and June 30, 1991, and who had an interest in the plan that was not fully vested, as well as the beneficiaries of those former Sea-Ray employees. Respondents, Class II: consisted of the present and former Sea-Ray employees who are or were participants in the plan and who may be entitled under the terms of the plan to receive a portion of the forfeitures resulting from the termination of employment of members of Class I, as well as the beneficiaries of those present and former Sea-Ray employees. Apx. 89. The district court, upon the Committee's motion, appointed counsel to represent each class. Apx. 92.

After the filing of cross-motions for summary judgment, the United States Magistrate Judge issued a Report and Recommendation, which found that there had been no partial termination of the plan. Apx. 20. By order dated July 7, 1997, the district court adopted the Report and Recommendation of the Magistrate Judge. Apx. 16. On appeal to the United States Court of Appeals for the Sixth Circuit, the court of appeals affirmed the lower court's order in a decision filed January 14, 1999. Apx. 1. The court of appeals denied Class I's petition for rehearing with a suggestion for rehearing en banc on March 11, 1999. Apx. 94.

## Statement of Facts

Title II of the Employee Retirement Income Security Act of 1974 (ERISA), amended the Internal Revenue Code of 1954 (the Code). Pub. L. 93–406, § 1012, codified as 26 U.S.C. § 411, amended the Code to codify existing regulations on minimum vesting standards for, among other things, employee stock ownership plans (ESOP). In order to be a "qualified trust," according to 26 U.S.C. § 411(d)(3), a plan must provide that "upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such . . . partial termination . . . are nonforfeitable." ***See also*** 26 U.S.C. § 401(a); 26 U.S.C. § 4975(e)(7).

Since the 1950's, Ray Industries has manufactured pleasure boats under the brand name "Sea Ray." After a period of unprecedented growth, Sea Ray was acquired by Brunswick Corporation in 1986. At this time, Sea Rays adopted an employee stock bonus plan and an employee profit sharing plan (collectively referred to as the Plan). Apx. 3. Sea Ray continued to expand. By 1988 Sea Ray had 10 production facilities and three other divisions. By early 1989 Sea Ray had 4,425 employees. Apx. 37. Early in model year 1989, which began July 1, 1988, retail sales continued to grow. But in March and April of 1989, retail sales began a sharp decline which was to continue at least until July 1991.

In May 1989, Sea Ray instituted the first of a series of layoffs and plant closings. By July 12, 1989, Sea Ray had laid off eight (8) percent of its total workforce of production employees. Apx. 31. In July it decided to close three plants and by the end of July 1989, an ***additional*** 29% of the workforce was laid off bringing the total percent of the layoffs for the three-month period between April 21, 1989 to July 27, 1989, to 35%. Apx. 31-32.

In August 1989, Sea Ray consolidated the workforce at four of its East Tennessee plants into two plants and advised former employees that their "temporary layoff" was now a

permanent one. Apx. 32-33. Explaining that "[s]oftening consumer demand for marine products" was to blame, Sea Ray conducted "permanent" layoffs in July, August, September and December (1990) at several of its plants and as well as at its main headquarters in Knoxville, Tennessee. Apx. 34. Sea Ray closed its Oxford, Michigan plant effective January 1991; additional layoffs occurred in March and May 1991. Layoffs continued through December 1992, after this action was commenced. Apx. 35-36.

On June 30, 1989, there were 4,425 total employees. On June 30, 1990, the number of employees was 3,309. By June 30, 1991, there were 2,028 total corporate employees, a total workforce reduction (including voluntary departures) of 54.2% over this two year period. Apx. 37.

Sea Ray's sales decreased from a high of 24,538 units in 1988 to 10,542 units in 1991. Apx. 30. The effect on the ESOP was equally dramatic. The plan participants as of July 1, 1989 were 3,832. By July 1, 1990, the participants decreased to 3,060 and by July 1, 1991, the number of participants dropped to 1,968. Adjusted to account for added participants during this period, plan enrollment for this two year was diminished to 49% of what it was (from 4,139, the total participants during the two year period, to 1,968). Apx. 38-39.

The Committee and Class II contended (and the district court so held) that the reductions in the plan should be separated by plan years (July 1 to June 30) because, according to them, 40 percent of the 1990-91 plan year layoffs were caused by the enactment of a federal "luxury tax." Apx. 60. Class I argued against this because the undisputed evidence established that the layoffs were continuing in nature and had no relationship to the individual plan years. Apx. 35, 64. The Sixth Circuit affirmed the district court on this conclusion (as well as others) using the clearly erroneous standard of review despite the fact that the appeal was from a grant of summary judgment.

The luxury tax was enacted on November 5, 1990, and became effective January 1, 1991, i.e., halfway through Sea Ray's 1990-91 plan year. (Pub. L. 101-508, Sec. 11221).[1] With respect to the first sale of a boat, the Act imposed a 10 percent tax on any amount exceeding $100,000. Sea Ray built these luxury yachts at three Florida plants - Merritt Island, Palm Coast, and Sykes Creek. Apx. 6, 26-27, 35, 60. Of the 454 employees Class II argued were laid off because of the luxury tax, at least 204 of them were laid off between July 1, 1990 (the beginning of the plan year) and November 5, 1990. The 204 employees laid off before the enactment of the luxury tax consisted of 74 employees laid off on July 6, 1990 from the Palm Coast plant, 35 and 95 employees who were layoff notices on September 28, 1990 from the Merritt Island and Palm Coast plants, respectively. Apx. 34-35. (This assumes, of course, that the remaining layoffs at the Merritt Island and Palm Coast plants were entirely attributable to the luxury tax.)

The Administrative Committee met in June 1992, to consider whether a partial termination had occurred. As the Magistrate Judge aptly stated, "[i]t is unclear if the percentage considerations were sufficiently examined at the meetings," Apx. 87, despite the fact that the Committee was aware of the potential that a sufficiently sizable decline in plan participation for reasons beyond the control of the employer may constitute a partial termination. Apx. 25, 84-85. The Committee, nevertheless, concluded that there had not been a partial termination because the reductions were caused by general economic conditions and not by an intent to "abuse" the plan. ***Id***.

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[1] The tax on boats was repealed in 1993 by Pub L. 103-66, § 13161.

## Argument

I.

A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

In ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101(1989), this Court held that "a denial of benefits challenged under [29 U.S.C. §] 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." ***Id.*** at 115. Because the Firestone plan did not confer any discretionary authority, the Court did not set forth criteria courts should use in examining the type of language which would confer discretionary authority on a plan administrator.

The question presented here is whether the language in the Sea Ray plan is sufficient to confer a deferential standard of review on the Committee's decision to deny benefits to terminated employees because, as the Respondent Committee decided, no partial termination had occurred.[2]

After ***Firestone***, most courts of appeals held that deferential review was required only by plan language which establish a "clear grant of discretion," ***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550, 555 (6th Cir. 1998) (en banc), or by plan

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[2] While the Court did not expressly hold that discretionary authority language in a plan will mandate an abuse of discretion review, the lower courts have generally adopted this as the alternative to the *de novo* standard of review. ***Varity Corp. v. Howe***, 516 U.S. 489, 513 (1996).

language which "expressly confers" discretionary authority on the plan administrator. ***Lynd v. Reliance Standard Life Ins. Co.***, 94 F.3d 979, 981 (5th Cir. 1996); ***see also Terry v. Bayer Corp.***, 145 F.3d 28 (1st Cir. 1998) ("clear discretionary grant" required); ***Wheeler v. Dynamic Engineering, Inc.***, 62 F.3d 634 (4th Cir. 1995) (must be an express grant of discretion); ***Hickey v. A. E. Staley Mfg.***, 995 F.2d 1385 (7th Cir. 1993) (de novo review applied because plan did not "expressly give" administrator discretion); ***Oldenberger v. Central States Southeast and Southwest Areas Teamster Penion Fund***, 934 F.2d 171 (8th Cir. 1991) (plan must "expressly give" administrator discretion); ***Bogue v. Ampex Corp.***, 976 F.2d 1319, 1325 (9th Cir. 1992), ***cert. den.*** 507 U.S. 1031 (1993) (administrator had discretion only where discretion was "unambiguously retained"); ***Kirwan v. Marriott Corp.***., 10 F.3d 784 (11th Cir. 1994) ("express language unambiguous in its design"); ***but see Hullett v. Towers, Perrin, Forster & Crosby, Inc.***, 38 F.3d 107 (3rd Cir. 1994) (express language not necessary, discretion may be implied); ***Heasley v. Belden & Blake Corp.***, 2 F.3d 1249 (3rd Cir. 1993) (clear and unequivocal grant of discretionary authority not necessary); ***Snow v. Standard Ins. Co.***, 87 F.3d 327, 330 (9th Cir. 1996) (discretion may be implied).

Despite these statements, the courts of appeals have struggled to apply ***Firestone*** consistently. The Court need only compare the recent ***en banc*** decision from the Sixth Circuit, in ***Perez***, with the even more recent ***en banc*** decision of the Ninth Circuit in ***Kearney v. Standard Insurance Co.***, ___ F.3d ___ (9th Cir. 1999). Despite very similar plan language,[3] the ***en banc*** Ninth Circuit expressly disagreed with the ***en banc*** Sixth Circuit's application (in ***Perez***) of the abuse of discretion

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[3] The operative language in ***Kearney*** was "upon receipt of satisfactory written proof" while in ***Perez*** the plan stated the administrator had the "right to require as part of the proof of claim satisfactory evidence." 150 F.3d at 552.

standard of review. That two federal courts of appeals had to resolve an issue of plan interpretation ***en banc*** would be proof enough of the need for guidance in this area. That they disagreed on the interpretation of virtually similar language confirms the following observation in the PENSION PLAN GUIDE ¶ 5920 (CCH 1998):

> While the general principles are clear enough, many questions remain. The Court [in ***Firestone***] failed to provide specific guidance as to what plan language is necessary to grant discretionary authority to an administrator or fiduciary, thus insuring that their decision are accorded deference by the courts. Furthermore, the Court did not define the scope of the ***de novo*** standard of review or the "new" deferential standard of review.
>
> Case law since the ***Firestone*** decision has helped to fill in the gaps left by the Court. However, with the Circuits developing their own rules, there are inconsistencies in the application of the Firestone rules.

In addition, the Sixth Circuit's decision herein conflicts with the interpretation given similar plan language by the Eleventh Circuit Court of Appeals. The language in the Sea Ray plan stating the powers of the Administrative Committee is in Section 16:

> The Committee shall have all powers necessary to enable it to administer the Plan and Trust Agreement in accordance with their provisions, including without limitation the following:
>
> . . . . .
>
> (2) determining the appropriate allocations to Participants' Accounts pursuant to Section 6;

> (3) determining the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;
>
> . . . . .
>
> (7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;
>
> . . . . .
>
> The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interests of the Participants (and their Beneficiaries). Any discretion granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on a nondiscriminatory basis.

The Sixth Circuit held that this language "clearly grants discretion to the committee" reasoning "[w]hile terms . . . such as 'construe' and 'interpret' by themselves would likely be enough to establish discretion, we need not decide that issue because § 16 also expressly gives the Committee 'discretion.'" 164 F.3d at 986. While the plan does use the word "discretion," the context in which it is used plainly shows that it was merely imposing a ***limit*** on discretion that may be granted by other plan provisions.[4]

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[4] The court of appeals and the district court may have attached some significance to the phrase in section 16 which provides the Committee with "all powers necessary to enable it to administer the Plan and Trust Agreement in accordance with their provisions." But because this phrase is simply a restatement of the authority and responsibility the common law vested in every trustee, ***Central States, Southeast & Southwest Areas***

The Sixth Circuit's decision in this case conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit which held the de novo standard of review applied where the plan gave the administrator the "authority to control and manage the operation and administration of the Plan" and the authority to "promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan." ***Kirwan***, 10 F.3d at 788. The Eleventh Circuit reasoned that this language "falls short of the express grant of discretionary authority necessary to trigger the arbitrary and capricious standard of review," because the grant of authority to promulgate rules and regulations is "merely a grant of administrative powers." Indeed, the Sixth Circuit's decision in this case is inconsistent with its own decision in ***Wulf v. Quantum Chem. Corp.***, 26 F.3d 13 68, 1372 (6th Cir. 1994), ***cert den***. 513 U.S. 1058 (1994), which followed the ***Kirwan*** decision. While both decisions were relied upon by Class I in their briefs, they were ignored by the panel.

The key omission in the Sea Ray plan is the absence of any ***discretionary*** authority to construe or interpret disputed terms in the plan. 418 U.S. at 115.[5] ***See also Varity Corp.***, 516 U.S. at 502-04. Authority to "construe and interpret the Plan" confers no ***discretionary authority***. It does not "clearly and

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***Pension Fund v. Central Transport, Inc.***, 472 U.S. 559, 570 (1985), it is not sufficient to confer deferential review either under the common law of trusts or ERISA. ***Firestone***, 489 U.S. at 111 & 113.

[5] ***Firestone*** is ambiguous on this point. The express holding in that case requires a plan to contain a grant of discretionary authority, 418 U.S. at 115. Other language in the decision, however, referred to the fact that Firestone's plan did not give the administrator the "power to construe uncertain terms." 489 U.S. at 111. In ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 515 (1993), the Court cautioned that it was "generally undesirable, where holdings of he Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."

explicitly determine the character of the power," Bogert & G. Bogert, LAW OF TRUSTS AND TRUSTEES 552, p. 66 (2d rev. ed. 1980), because it is not a conferral of the "power to control what the plan did." ***Mertins v. Hewitt Associates***, 508 U.S. 248, 262 (1993). The grant here is little more than a restatement of the obligation every trustee has to "acquaint[] himself with the terms of the trust. . . ." Restatement (Second) of Trusts 174, comment c (1959).

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

After holding that the plan conferred "discretion" upon the Committee, the Sixth Circuit held that it would defer to the Committee's determination that a partial termination had not occurred. In so doing, the court expressly disagreed with decisions from other courts of appeals. Apx. 8-9. In ***Weil v. Retirement Plan Admin. Comm.***, 913 F.2d 1045, 1048-49 (2nd Cir. 1990), on petition for rehearing, 933 F.2d 106 (2nd Cir. 1991) (***Weil II***), the court held that the determination of whether a partial termination had occurred was a question of law, and therefore the fiduciary's decision was not subject to deference. ***See also Gauer v. Connors***, 953 F.2d 97, 99-100 (4th Cir. 1991); ***Penn v. Howe-Baker Engineers, Inc.***, 898 F.2d 1096 (5th Cir. 1990); ***Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust***, 920 F.2d 651, 657 (10th Cir. 1990).

By reviewing the Committee's decision under the arbitrary and capricious standard, the Sixth Circuit gave greater deference on a matter of statutory interpretation to a plan

administrator than a court gives to an agency charged with interpreting the same statute. ***Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 844-45 (1984). The Sixth Circuit's only reason for doing so was that the language of the statute was included in the plan. But every plan provides for the contingency of a partial termination and the decision as to whether a partial termination has occurred should not be regarded as a matter of plan interpretation.[6] As the Second Circuit recognized in ***Weil II***, the inquiry requires an interpretation of the Internal Revenue Code, tax regulations, as well as federal court and tax court decisions. 933 F.2d at 107-09. Even if a plan expressly granted a plan administrator the power to construe a federal statute, and the instant plan does not, it would still be inappropriate to defer to a plan administrator's interpretation of that statute.

Closely related to the conflict created by the Sixth Circuit's decision in this case is the conflict among the circuits on on whether ***Firestone*** applies to factual findings by an administrator.

In ***Firestone,*** 489 U.S. 108, this Court limited its discussion to "the appropriate standard of review in [29 U.S.C.] § 1132(a)(1)(B), actions challenging denials of benefits based on plan interpretations." One commentator has observed that "courts of appeals have disagreed about whether the ***Bruch*** standard should only 'be applied when a benefits decision turns on the facts of the case, rather than the interpretation of the terms in the ERISA plan.'" Grant, Note, ***Battling for ERISA Benefits in the Ninth Circuit: Overcoming Abuse of Discretion Review***, 28 SOUTHWESTERN UNIVERSITY LAW REVIEW 93, 99 (1998) (quoting ***Pierre v. Connecticut Gen.***

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[6] In ***Bruch v. Firestone Tire & Rubber Co.***, 828 F.2d 124, 151 (3rd Cir.1987), ***aff'd in part, rev'd in part***, 489 U.S. 101 (1989), the court of appeals noted that the loss of tax qualified status is a "very severe penalty" and as a result all qualifying pension plans contain the assurances" set forth in § 411(d)(3).

***Life Ins.***, 502 U.S. 973, 974 (1991) (White, J. dissenting from denial of certiorari).

The majority of courts of appeals have held that ***Firestone's de novo*** review requirement extends to factual determinations made by plan administrators unless the plan "explicitly vests fact-finding discretion in the plan administrator." ***Rowan v. Unum Life Ins. Co. of America***, 119 F.3d 433 (6th Cir.1997); ***accord Heidgerd v. Olin Corp.***, 906 F.2d 903, 908-09 (2nd Cir. 1990); ***Luby v. Teamsters Health, Welfare, and Pension Trust Funds***, 944 F.2d 1176 (3d Cir.1991); ***Reinking v. Philadelphia American Life Ins. Co.***, 910 F.2d 1210 (4th Cir.1990), overruled on other grounds, ***Queisinberry v. Life iNs. Co. of North America***, 987 F.2d 1017 (4th Cir. 1993); ***Ramsey v. Hercules Inc.***, 77 F.3d 199, 203-04 (7th Cir. 1996); ***Paramore v. Delta Airlines***, 129 F.3d 1446 (11th Cir. 1997).

In contrast, the United States Court of Appeals for the Fifth Circuit has held that it is appropriate under ***Firestone*** to apply different standards of review to claim denials based on factual determinations than are applied to denials based on interpretations of plan language. ***Pierre v. Connecticut General Life Ins. Co.***, 932 F.2d 1552 (5th Cir.), ***cert. denied***, 502 U.S. 973 (1991); ***Wildbur v. Arco Chemicals***, 974 F.2d 631, 635 (5th Cir. 1992). The Fifth Circuit continues to adhere to this position. ***Meditrust Financial Services Corp. v. The Sterling Chemicals, Incorporated, Medical Benefits Plan for Hourly-paid Employees***, 168 F.3d 211, 214 (5th Cir. 1999). The Eighth Circuit appears to agree with the Fifth Circuit's position. ***Cox v. Mid-America Dairyman, Inc.***, 965 F.2d 569, 571 n. 2 (8th Cir. 1992).

Class I has repeatedly argued that, even if a court defers to a plan administrator's legal conclusions, a court should not defer to an administrator's interpretation of a statute for the same reason the court does not defer to factual findings of the Committee. Even if the plan gives the Committee some discretionary authority, nothing in the plan gives the

Committee the power to make factual findings. There is no language in the plan which gives the Committee the authority to determine "eligibility for benefits," language the courts of appeal have found to be sufficient to confer deferential review of a plan administrator's factual findings.[7] ***E.g.***, ***Paramore***, 129 F.3d at 1450-51.

A number of courts and writers have written about the need for further guidance on these issues. One commentator summed up the problems as follows:

> Although the Supreme Court intended ***Bruch*** to bring uniformity to the circuits and settle the controversy over the standard of review, it did not succeed in doing so; rather, it appeared to engender considerable confusion. There was some uncertainty as to what kind of plan language was sufficient to grant an administrator or trustee "discretion," thus lowering the standard from de novo to abuse of discretion. Other courts were unsure how to undertake a de novo review, and many were confused as to whether the new abuse of discretion standard

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[7] In accepting the Magistrate Judge's report, the district court aptly commented that the Magistrate Judge "had to wrestle with the familiar, ***yet difficult***, question of the appropriate standard of review to apply to the decision of the Plan's administrator." Apx. 18 (emphasis added). The Magistrate Judge's very conscientious attempt to construe the plan is nevertheless a perfect example of the need for guidance. The Magistrate Judge held that a provision in the plan which gave the Committee authority to "determine the amount" of benefits gave the Committee discretion to determine whether benefits were payable ***at all*** because of a partial termination. Apx. 44. The Sixth Circuit made the same mistake, Apx. 9, ignoring its own prior decision which held that a grant of the power to determine the "amount of the benefits" to which a participant may be entitled was not a grant of discretionary authority to interpret the plan. ***Anderson v. Great West Life Assur. Co.***, 942 F.2d 392, 394 (6th Cir. 1991).

was less or more stringent than the previous arbitrary and capricious standard, or whether it was the same.

Heyl, Note, ***Bedrick v. Travelers Insurance Co.*: *The Fourth Circuit's Continued Attempt to Work with the "Doctrinal Hash" of the Standard of Review in ERISA Benefit-Denial Cases***, 75 NORTH CAROLINA L. REV. 2382, 2406-07 (1997) (and cases cited therein).

C.

Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator.

In addition to the standard of review, a significant issue in this case related to whether the court was limited to considering the evidence considered by the Committee. While the Sixth Circuit held that the abuse of discretion standard of review applied to the Committee's decision, it then considered evidence not relied upon or considered by the Committee. In so doing, it disregarded its own precedent, in which it held that where a court is reviewing a plan administrator's decision deferentially, the court is limited to the factual record compiled by the plan administrator absent exceptional circumstances. ***Wilkins v. Baptist Healthcare System, Inc.***, 150 F.3d 609, 613 & 618 (6th Cir. 1998); ***Perry v. Simplicity Eng'g*** , 900 F.2d 963, 966-67 (6th Cir. 1990); ***accord Sandoval v. Aetna Life & Casualty Ins. Co.***, 967 F.2d 377 (10th Cir.1992).

The lower courts are divided on how to review a plan administrator's decision. With respect to the de novo standard, the Second Circuit, in ***DeFelice v. American International Life***, 112 F.3d 61 (2nd Cir. 1997), observed that courts "presented with this issue have reached varied results:"

The Sixth Circuit has held that no evidence beyond the administrative record is permissible, on the grounds that district courts ought not to become "substitute plan administrators." ***Perry v. Simplicity Eng'g*** , 900 F.2d 963, 966-67 (6th Cir. 1990). While the Eleventh Circuit seems comfortable allowing district courts to rely upon entirely new evidence without restriction, ***Moon v. American Home Assurance Co.*** , 888 F.2d 86, 89 (11th Cir. 1989), other courts, including the Eighth Circuit, have permitted some additional evidence where the administrative record is inadequate to conduct a proper review of the administrative decision. ***Donatelli v. Home Ins. Co.***, 992 F.2d 763, 765 (8th Cir. 1993) (decision within discretion of trial court, which should not be exercised absent good cause); ***Quesinberry v. Life Ins. Co. of N. Amer.*** , 987 F.2d 1017, 1021-27 (4th Cir. 1993) (en banc); ***cf. Luby v. Teamsters Health, Welfare, and Pension Trust Funds***, 944 F.2d 1176, 1184-85 (3d Cir. 1991) (where record is sufficiently developed below, court may limit review to that evidence even upon de novo review). The Second Circuit has considered one aspect of this issue, and has held that additional evidence may be considered upon de novo review of an issue of plan interpretation. ***See Masella v. Blue Cross & Blue Shield of Connecticut, Inc.***, 936 F.2d 98, 103-05 (2d Cir. 1991). Masella explicitly did not decide whether additional evidence may be considered upon de novo review of factual issues. It noted, however, that a claimant might be obligated to present to plan administrators all evidence regarding the claimant's condition, id. at 105, but would be unfairly burdened by an obligation to present expert testimony to plan administrators on an issue of plan interpretation. Id.

If de novo review is appropriate in the instant case, then it will be essential for the Court to clarify how a court should review a plan administrator's decision and whether that decision can be upheld by a court on grounds other than those relied upon by the Administrator. The Court should also resolve the evidence a lower court may consider in reviewing the administrator's decision.

But especially if discretionary review is appropriate, the Court should address whether a court may uphold a plan administrator's decision on grounds other than those relied upon by the plan administrator. For example, a significant factor to consider in a partial termination claim is the total percentage reduction of plan participants. ***Halliburton Co. v. C.I.R.***, 100 T.C. 216, 236-37 (1993), ***aff'd***, 25 F.3d 1043 (5th Cir.), ***cert. denied*** 513 U.S. 989 (1994). In this case, the Sixth Circuit found that the Committee "decided to calculate the percentage of layoffs for each [plan] year separately." Apx. 6. But the chair of the Committee admitted that the Committee did not calculate the reduction percentages by separate plan years. Apx. at 85. Instead, separate plan year calculations were ***first*** proposed after the complaint was filed. Apx. 64. While there are other examples of "post - hoc" justifications for the Committee's decision, they will be addressed as part of Question II.

**Conclusion to Question I**

"The basic thrust of the [ERISA] pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." ***New York State Conference of Blue Cross Plans v. Travelers Ins. Co.***, 514 U.S. 645 (1995). With over 9,000 ERISA claims being filed in each of the last five years, ***see*** Table C-2A of JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, the current state of disarray on how to review a plan administrator's decision unquestionably compromises a

fundamental purpose of ERISA, warranting further review by this Court.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

The Sixth Circuit erroneously applied the "clearly erroneous" standard of review to four issues decided by the district court (and the magistrate judge). The first issue concerned the district court's decision that the individuals who resigned from their employment with Sea Rays were not "constructively discharged" even though the court of appeals agreed with Class I's assertion that "that some former Sea Ray employees felt compelled to leave in light of the economic downturn." Apx. 13-14. The court of appeals further held that it was not "firmly convinced" that the district court erred in deciding that the layoffs attributed to the luxury tax amounted to second "major corporate event." Apx. 13. Based upon this finding, the court of appeals then upheld the division of the reductions into separate plan years. Finally, the court of appeals held the district court's adoption of Class II's reduction percentages was not "clear error." Apx. 14.

The appeal was pending before the district court on cross-motions for summary judgment. Apx. 6, 17, 20. On appeal from the grant of a summary judgment motion, the appellate court is supposed to review the record using the same standard applied by the district court, whether there is a genuine issue of material fact. ***See Hunt v. Chromartie***, ___ U.S ___, 67 U.S.L.W. 4306 (1999).

To understand the harm caused by these findings it is necessary to review the "common law" of partial terminations, as it has been derived by the federal courts and the tax court. A "plain english" definition of "partial termination" appears in ***Morales v. Pan American Life Ins. Co.***, 718 F.Supp. 1297, 1302 (E.D.La. 1989), ***aff'd***., 914 F.2d 83 (5th Cir. 1990):

> A partial termination occurs when, in connection with a major corporate event, a significant percentage of employees covered by the plan are involuntarily excluded or terminated from participating in the plan.

The Department of the Treasury regulations require consideration of all the "facts and circumstances":

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

26 C.F.R. § 1.411(d)-2(b)(1).

The partial termination provision has two purposes: to protect employees legitimate expectations of benefits and to prevent employers from taking unfair advantage of the favorable tax treatment. ***Halliburton***, 100 T.C. at 227, citing ***Gluck v. Unisys Corp.***, 960 F.2d 1168, 1182-83 (3d Cir. 1992), and ***Chait v. Bernstein***, 835 F.2d 1017, 1021 (3d Cir. 1987). Congress recognized when enacting ERISA that a partial

termination could occur as a result of "a large reduction in the work force." S. Rept. 93-383, at 50 (1973).

"An additional circumstance which courts attempt to identify in deciding whether a partial termination has occurred is the occurrence of a major corporate event in connection with the reduction in plan participation." ***Halliburton***, 100 T.C. at 230. The purpose of identifying a major corporate event is to be able to identify the cause for the reduction in plan participants. Respondents' claim that there are two major corporate events here is an attempt to argue there were two underlying causes of the massive reductions in plan participants. As the Tax Court explained it, "Reductions in participation unrelated to such cause are not relevant to the question of whether a partial termination occurred . . . ." ***Id***.

Creating an artificial split in the plan years was an important part of Respondents' litigation strategy (even though it was never part of the Committee's reasoning) because it is uniformly held that "the size of the drop in plan participation resulting from the event" is one "of the most important facts" bearing on the issue. ***Id***. at 231; ***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***, 833 F.2d 74, 79 (6th Cir. 1987). Indeed, the percentage of the reduction in plan participation in and of itself may be sufficient to constitute a partial termination. ***Id***. at 80. The purely artificial splitting in the plan years allows Respondents to keep the reduction percentages as low as possible despite a continuing and uninterrupted reduction in the work force.

Resolution of the partial termination issue in this case turned upon the application of two factors: the "major corporate event" issue and how to take into account the employees who quit working at Sea Ray because of the volatile uncertain economic times.

The analysis of the major corporate event begins with the luxury tax. Respondents argued that during plan year 1990-1991, 454 employees were laid off from the three plants that built luxury boats. Apx. 60. But what Respondents failed to

acknowledge was the undisputed fact that at least 204 of these employees were laid-off ***before*** the bill imposing the luxury tax was even ***introduced*** into Congress.[8] Apx. 34-37, 60. The luxury tax could not possibly have influenced these layoffs, thus casting considerable doubt on Class II contention (which the district court adopted) that the reductions caused by the luxury tax represented 44 percent of the reductions for plan year 1990-1991. Apx. 34-36, 60. But Class II's reasoning was circular: separate plans years were appropriate because a large percentage of the layoffs in the ***second plan year*** were caused by the luxury tax. Nothing in the IRS Plan Termination Handbook, on which Class II relied, mandates the use separate plan years. The proposition has been expressly rejected by one court:

> Defendants argue that in determining whether a vertical partial termination occurred the Court should consider only the number of employees excluded within a single plan year. The Court does not find this position to be supported by logic or required by authority. . . .There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar year has no intrinsic relevance in making this evaluation.

***In re Gulf Pension Litigation***, 764 F. Supp. 1149, 1166-67 (S.D. Tex. 1991), ***aff'd sub nom., Borst v. Chevron Corp.***, 36 F.3d 1308 (5th Cir. 1994), ***cert. den.*** 514 U.S. 1066 (1995).

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[8] H.R. 5835 was introduced into the 101st Congress on October 15, 1990. It was passed on November 5, 1990, and became Pub. L. 101-508. It should also be remembered that the plan year ran from July 1 to June 30. The 204 employees laid off before the enactment of the luxury tax consisted of 74 employees laid off in July 1990 from the Palm Coast plant, 35 employees laid off from the Merritt Island plant in September 1990 and 95 employees laid off from Palm Coast in September 1990. Apx. 34.

The district court's only reason for dividing the reductions into separate plan years was its conclusion that the luxury tax brought about an "additional large wave of layoffs." Apx. 65. What is important here is in using the clearly erroneous standard of review, the Sixth Circuit ignored Class I's argument that the impact of the luxury tax could not justify artificially dividing ***all*** of the workforce reductions -- including the work force reductions at plants which made boats not subject to the luxury tax -- by separate plan years.

The Sixth Circuit also ignored Class I's argument that separate plan year reduction percentages were inappropriate because the ***Committee*** did not divide the percentages into separate plan years but, as member Barrington testified, examined them over the "the ***total*** two year period." Apx. 85 (emphasis added). Respondents cannot have it both ways. If the Committee's decision on the partial termination issue must be reviewed for an abuse of discretion, then it is disingenuous for them to argue the Committee's decisions should be affirmed on grounds other than those relied upon or even considered by the Committee. These were disputed issues of fact which the court of appeals should have reviewed ***de novo***. ***See Matsushita Electric Industrial Co. v. Zenith Radio***, 475 U.S. 574 (1986).

The Sixth Circuit also applied the clearly erroneous standard to the constructive discharge issue relying upon its decision in ***Kreis***, 833 F.2d at 81. Apx 13. While the court of appeals agreed with Class I's assertion that "some former Sea Ray employees felt compelled to leave in light of the economic downturn." Apx. 13. It held, however, that this was not enough to support a claim of constructive discharge. The Sixth Circuit gave no consideration to whether it was consistent with the intent of the partial termination statute for it to apply the rigorous constructive discharge standard to the facts of a partial termination case involving thousands of workers. ***See Sure-Tan, Inc. v. NLRB***, 467 U.S. 883, 895 (1984).

The Sixth Circuit's application of the constructive discharge doctrine establishes that it misunderstood the nature of the partial termination statute. This is shown by its statement that "[t]o characterize the conditions at Sea Ray as intolerable is to impute liability to the company simply because of broad economic conditions which were beyond the company's control." Apx. 13. But the partial termination rule is designed to protect the vesting of employee pension benefits. ***Halliburton***, 100 T.C. at 227. The "remedy" for a "violation" is to immediately vest 100% of the employers' ***previously made*** contributions to the affected employees' accounts. 26 U.S.C. § 411(d)(3). There would be no liability on the part of Sea Ray, the employer, if for no other reason than that it is not a party to this lawsuit. Indeed, a finding of a partial termination imposes no "liability" on the plan itself. Rather, a partial termination finding ***prevents*** a forfeiture of accrued but not fully vested benefits and precludes the Class II Respondents (who were or would be fully vested participants) from receiving a windfall.

In short, the focus should not be on whether employees were constructively discharged as that term is commonly used but on the reason employees left, i.e., was the departure related to the downturn in economic conditions. See ***Halliburton***, 100 T.C. at 230. There, the Tax Court held that "employees who leave of their own accord after it is clear that there is no prospect of continuing to work for the employer may also be considered as having been involuntarily terminated." 100 T.C. at 240. Where layoffs on the scale presented in this case are considered, the partial termination inquiry should be sufficient broad so as to encompass so-called "voluntary" departures when the evidence shows that the employer did not replace the position vacated by the departing employee within a reasonable period of time.

The rules of the Supreme Court provide that certiorari will be considered where a federal court of appeals "has so far departed from the accepted and usual course of judicial

proceedings . . . as to call for an exercise of this Court's supervisory power." S.Ct. Rule 10(a). The Sixth Circuit application of the clearly erroneous standard of review in a summary judgment appeal is a quintessential example of a significant departure from accepted judicial proceedings.

**Conclusion**

For the reasons herein discussed, petitioners pray that this petition for a writ of certiorari should be granted and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1999 and March 11, 1999.

Respectfully submitted,

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## TABLE OF CONTENTS

Published Decision of the United States
Court of Appeals for the Sixth Circuit
Dated January 14, 1999 ..... Appendix Page 1

Memorandum and Order of United States
District Court Dated July 7, 1997 ..... Appendix Page 16

Report and Recommendation of Magistrate Judge
Dated October 30, 1996 ..... Appendix Page 20

Memorandum and Order of United States
District Court April 13, 1993 ..... Appendix Page 89

Order Dated March 11, 1999,
Denying Petition for Rehearing ..... Appendix Page 94

Excerpts from the Sea Ray Employees'
Stock Ownership And Profit Sharing Plan Appendix Page 96

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# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, et al.,
*Plaintiffs-Appellees,*

*v.*

DANIEL ROBINSON, et al. (Class I),
*Defendants-Appellants,*

SHARON BALDOCK, et al. (Class II),
*Defendants-Appellees.*

No. 97-5958

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 92-00587—James H. Jarvis, II, Chief District Judge.
Argued: September 22, 1998
Decided and Filed: January 14, 1999
Before: KENNEDY and COLE, Circuit Judges;
RUSSELL,District Judge.*

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*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

## COUNSEL

**ARGUED:** E. H. Rayson, KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, Knoxville, Tennessee, for Appellants. James D. Holzhauer, MAYER, BROWN & PLATT, Chicago, Illinois, Jonathan D. Reed, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, for Appellees. **ON BRIEF:** E. H. Rayson, William P. Snyder, John C. Burgin, Jr., KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, Knoxville, Tennessee, for Appellants. James D. Holzhauer, MAYER, BROWN & PLATT, Chicago, Illinois, Jonathan D. Reed, Joe Mont McAfee, Michael T. McClamroch, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, for Appellees.

## OPINION

R. GUY COLE, JR., Circuit Judge. At issue in this appeal is whether the layoffs at Sea Ray Boats, Inc. between 1989 and 1991 constituted a partial termination of the company's stock ownership and profit sharing plan ("Plan"), governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Sea Ray's administrative committee ("Committee") concluded that the company had not terminated the Plan. Upon review, the district court granted summary judgment in favor of the Committee and a class of Sea Ray employees ("Class II") who are current or fully vested participants in the Plan and their beneficiaries. Another class of former Sea Ray employees ("Class I"), non-vested former participants in the Plan and their beneficiaries, contends that the district court erred in applying an arbitrary and capricious rather than a de novo standard of review of the Committee's decision. Class I also contends that the Committee erred in determining that a partial termination of the Plan had not

occurred. For the reasons that follow, we affirm the judgment of the district court.

I.

Sea Ray manufactures sport boats, sport cruisers, and yachts — a particular line of boats known as pleasure crafts. Founded in the late 1950s by C.N. Ray in Oxford, Michigan, the company enjoyed steady growth from the late 1960s through the 1970s. During this time, it systematically opened new plants and renovated existing ones. During the 1980s, the company experienced unprecedented growth, enjoying an average annual growth of 35 percent from 1983 to 1986 and record sales from 1986 to 1988. In 1986, Brunswick Corporation purchased Sea Ray, but allowed it to operate as a separate entity.

As part of its employee benefits, Sea Ray offers employees membership in the Plan, a defined contribution stock bonus and profit-sharing plan established under the provisions of ERISA. The Committee, as a fiduciary under ERISA, acts as the administrator for the Plan. Sea Ray funds the Plan in its entirety; participating employees do not contribute to the Plan. The Plan's assets are allocated to the individual accounts of its participants, with the benefits of each participant based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, or forfeitures of accounts of other participants which may be allocated to such participant's account. Although membership in the Plan is voluntary, a majority of Sea Ray's employees participate.

Sea Ray begins contributing to the Plan on behalf of an employee after he or she has completed one full year of service. As permitted under ERISA, 29 U.S.C. § 1053(a)(1)(B), the Plan adopts a gradual vesting formula:

| Credited Service | Vested (or Non-Forfeitable) Percentage |
|---|---|
| fewer than 3 year | 0% |
| 3 years | 20% |
| 4 years | 40% |
| 5 years | 60% |
| 6 years | 80% |
| more than 7 years | 100% |

Employees become fully vested in their account balances after they have worked at Sea Ray for seven full years. Under normal circumstances, if an employee leaves Sea Ray before completing seven years of service, the non-vested (or forfeitable) portion of his or her account balance is reallocated among the employees who remain at Sea Ray and are currently participating in the Plan.

The one exception to reallocation for non-fully vested employees, stated in § 19 of the Plan and codified in ERISA, 26 U.S.C. § 411(d)(3), occurs if Sea Ray engages in a partial termination of the Plan. In this event, the terminated employees become fully vested and are entitled to retain their full account balances irrespective of the years they have actually served.

During Sea Ray's period of unprecedented growth, membership in the Plan grew from 1,501 employees in July 1985 to 3,832 employees in July 1989. Beginning in March 1989, however, Sea Ray began to experience serious declines in sales, affecting all boats except yachts. During many of the months during 1989 through 1991, Sea Ray laid off part of its work force; some layoffs began as temporary, but almost all became permanent. By June 1990, as the company reduced its number of employees, the number of participants in the Plan declined to 3,060 employees. In 1990, Congress passed a federal luxury tax targeting five high-priced consumer goods — private boats, private planes, cars, jewelry, and furs — as part of its annual budget agreement: effective January 1991, any

boat was subject to a 10 percent tax for the amount above $100,000. In the aftermath of the luxury tax, sales of all boats continued to decline as did the number of participants in the Plan. By June 1991, membership in the Plan had shrunk to 1,968 participants and twelve of the thirteen plants had either reduced their workforce or closed altogether.

Between 1989 and 1991, decisions regarding hiring, firing, and dismissal of employees were not vested in any one centralized figure or manager but left to the discretion of each plant. Since each plant at Sea Ray was operated separately as a profit center, each plant's manager determined the plant's criteria for laying off employees at his or her plant.[1] During the downsizing, however, Sea Ray's corporate headquarters issued written directions to affected plant managers on how to handle the layoffs.

In June 1992, prior to any litigation leading to the present case, the Committee convened to discuss the partial termination question and the governing legal standards, and made the following determinations:

1. The reductions in employees was motivated by unfavorable changes in the economy and not by targeted employment numbers.
2. Partial determinations were defined by the Internal Revenue Code and determined on the basis of all facts and circumstances.
3. The historic application of the partial termination rule focused primarily on whether the termination resulted in funds reverted to the employer or discrimination in favor of highly compensated

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[1]Each laid-off employee completed a "Change of Employee Status" ("COS") form, which provided the work history, and also served as an exit interview with the individual in charge of the plant's personnel. Sea Ray systematically gathered COS forms from the plants, but did not use them in determining the number of participants in the Plan, instead relying on annual company census lists containing the name of all employees.

employees; recently, however, the emphasis had shifted to percentage decline in employment.

4. Case law was unsettled on what constitutes a significant decline and the level of deference, if any, owed to employer or IRS determinations.
5. Lastly, the courts' determinations regarding partial terminations were binding on the IRS only if it joined the suit or the suit was an appeal of a final administrative determination by the IRS.

Later that month, the Committee reconvened and concluded that for the period between 1989 and 1991, "there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of a Partial Termination." In making that determination, the Committee decided to calculate the percentage of layoffs for each year separately. The Committee also decided that the company would retain legal counsel to commence a lawsuit on behalf of the plan to seek a judicial ruling upholding the Committee's determination that a partial termination did not occur. The Committee filed an action before the district court in August. Following pre-trial matters, Class I filed a motion for summary judgment on December 1995. The Committee and Class II each filed a cross-motion for summary judgment in March 1996. The district court referred the motion and cross-motions to a magistrate judge, who recommended that the district court grant the cross-motions by the Committee and Class II and deny the motion by Class I. Specifically, it recommended holding that 1) the Committee's determination that a partial termination had not occurred was subject to the arbitrary and capricious standard of review; 2) the layoffs, calculated as caused by two separate corporate events, were not at a level generally considered determinative of a partial termination; and 3) the Committee's determinations regarding partial termination were neither arbitrary nor capricious. Although Class I filed an objection to the magistrate judge's report and

recommendation, the district court accepted it in its entirety. Class I filed a timely notice of appeal.

**II.**

We review a district court's order granting summary judgment de novo. *See Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This court draws all reasonable inferences in favor of the non-moving party. *See Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986)). This court recognizes, however, that "the mere existence of a scintilla of evidence in support of [a party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

**III.**

We first address whether the Plan vests discretionary authority in the Committee, the administrator of the Plan. If so, we then apply the arbitrary and capricious standard of review to the Committee's decision that a partial determination of the Plan did not occur at Sea Ray between 1989 and 1991. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 555 (6th Cir. 1998) (en banc) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

The Committee contends that the Plan grants it discretion to determine partial determinations, pointing to the language in § 16(c) of the Plan:

> The Committee shall have *all powers necessary* to enable it to administer the Plan and Trust Agreement in accordance with their provisions, including without limitation the following:

. . .

(2) *determining* the appropriate allocations to Participants' Accounts pursuant to Section 6;

(3) *determining* the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;

. . .

(7) *construing and interpreting* the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;

. . .

The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interests of the Participants (and their Beneficiaries). Any *discretion* granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on a nondiscriminatory basis.

(emphasis added).

Class I contends that the Committee lacked discretion in this matter because any such determination turned on a matter of law. Although the Plan allows the Committee to determine whether the Plan had been partially terminated, it does not define "partial termination." Class I contends that, as a matter of law, this determination should be provided not by the Committee, but by the court. Therefore, this court should apply a de novo standard of review, following other circuits which have held that eligibility under ERISA and its regulations are a question of law. *See e.g., Weil v. Retirement Plan Admin. Comm. of Terson Co., Inc.*, 913 F.2d 1045, 1048-49 (2nd Cir.

1990); *Gauer v. Connors*, 953 F.2d 97, 99-100 (4th Cir. 1991); *Pratt v. Petroleum Production Management. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 658 (10th Cir. 1990).

Because the Plan is governed by ERISA, we apply federal common law rules of contract interpretation in making our determination. *See Perez*, 150 F.3d at 556. In doing so, we "take direction" from state law and general contract law principles and interpret the Plan's provisions "according to their plain meaning, in an ordinary and popular sense." *Id.* (internal citations omitted). Plain meaning requires that we "must give effect to the unambiguous terms of an ERISA plan." *Id.* (internal citations omitted).

We find that a plain reading of the Plan reveals that it clearly grants discretion to the Committee. We have earlier held that discretionary authority does not "hinge[] on incantation of the word 'discretion' or any other 'magic word,'" *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1572, n.2 (6th Cir. 1992) (quoting *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992)), but whether the ERISA plan grants the administrator "authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115. While terms in § 16 of the Plan such as "construe" and "interpret" by themselves would likely be enough to establish discretion, we need not decide that issue because § 16 also expressly gives the Committee "discretion."

We reject Class I's contention that because the Plan does not define "partial termination," the Committee's discretion does not extend to partial terminations. The Committee's discretion to interpret and construe the Plan logically extends to terms of the Plan, since any interpretation of a plan turns on the meaning of terms contained therein. To limit an administrator's discretion to only those terms explicitly defined would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term.

We also reject Class I's argument that eligibility determinations are questions of law subject to de novo review. Although other circuits have adopted this view, *see Weil*, 913 F.2d at 1048-49; *Gauer*, 953 F.2d at 99-100; *Pratt*, 920 F.2d at 658, we have declined to do so. The Committee, by virtue of its grant of discretion, may interpret the language of terms in the plan. *See Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989).

Accordingly, we review the Committee's determinations regarding partial terminations under the arbitrary and capricious standard.

**IV.**

Having established the appropriate standard of review, we now evaluate whether the Committee's determination that a partial termination did not occur between 1989 and 1991 was arbitrary and capricious. The Committee contends that the percentage of terminations at Sea Ray during these years, in the absence of improper motive or bias on the part of Sea Ray, did not constitute a partial termination. Class I counters that the percentage of terminations was higher than the Committee calculated, and the real percentage was high enough in itself to be determinative of a partial termination. The differences in calculations stem from the Committee's decision to calculate the layoffs from each year separately and to exclude certain classes of former employees in its tally of terminated employees.

In determining whether a partial termination has occurred, this court has held that Treasury Regulation § 1.411(d)-2(b)(1)[2]

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[2]Treasury Regulation § 1.411(d)-2(b)(1) states,

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to *all the facts and circumstances in a particular case*. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the

"directs us to consider all the facts and circumstances, of which the percentage of excluded plan participants is but one, albeit generally the most persuasive one." *Kreis v. Charles O. Townley, M.D. and Associates, P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). In some cases, however, we have held that "the percentage may be so high or so low as to be determinative standing alone." *Id.* at 80.

Neither this court nor other circuits have established clear benchmarks for these high or low percentages. This court noted that one court has held 34 and 51 percent terminations of the work force constituted partial terminations, while other courts have held that termination rates of 16.7 percent, 13.0 percent, and 12.4 percent were insufficient to trigger a partial termination. *See id.* at 83 (citing *See Tipton and Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 162 (1984) (34 and 51 percent); *Wishner v. St. Luke's Hosp.*, 550 F.Supp. 1016, 1019 (S.D.N.Y. 1982) (16.7 percent); *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, No. C 84-253A, 1984 WL 8144, at *3 (N.D.Ga. Nov. 30, 1984) (13.0 percent); *Babb v. Olney Paint Co.*, 764 F.2d 240, 243 (4th Cir. 1985) (12.4 percent)). The United States Tax Court in *Halliburton Co. v. C.I.R.*, 100 T.C. 216 (1993) stated that a percentage exceeding 50 percent may be sufficient standing alone to establish a partial termination; conversely, a drop of less than 20 percent is significant only if accompanied by egregious abuse on the part of the employer. *See id.* at 236-37. A drop of at least than 20 percent is sufficient, if coupled with other circumstances, to suggest a partial termination. *See id.* at 237. We decline to establish rigid percentage parameters for partial terminations, and repeat our holding in *Kreis* that while the percentage of excluded plan participants is the most persuasive factor, we must generally consider all the facts and circumstances, "unless

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rights of employees to vest in benefits under the plan. (emphasis added).

and until Congress or the Treasury Department provides otherwise." *Kreis*, 833 F.2d at 80.

Before evaluating the Committee's determination, we must first ascertain the percentage of participants involuntarily excluded from the Plan between 1989 and 1991 through actual or constructive discharge. Whether an actual or constructive discharge has occurred is a question of fact, *see id.* at 81, and we must affirm the district court's findings on this question unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a). A finding of fact is clearly erroneous only when, although there may be some evidence to support the finding, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (citation omitted).

The district court first concluded that the layoffs at Sea Ray between 1989 and 1991 were caused by two separate events: a two-year downturn in the small boat industry and a downturn in the large boat business caused by the federal luxury tax. It therefore decided to analyze the percentage of actual or constructive discharges as separate years. In deciding which terminated employees to count for the partial termination calculation, the court excluded classes of employees who left Sea Ray for the following reasons: death, normal retirements, terminations for cause, terminations due to disabilities, departure due to a transfer, and voluntary departures — even if the departure were influenced by the economic downturn at the company. Class I disagrees with the district court's findings, maintaining that the discharges should be considered as one event and that former employees who left in anticipation of an involuntary layoff should count as constructive discharges.

We see no occasion to disturb the factual findings of the district court. First, our review of the record does not firmly convince us that the district court erred in its conclusion that two events occurred. We agree that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent

factors. Second, while we do not dispute that some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work. *See e.g., Kreis*, 833 F.2d at 82-83; *see also Halliburton*, 100 T.C. at 241 (stating same proposition). The record does not reflect that working conditions at Sea Ray were "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982) (internal citations omitted). To characterize the conditions at Sea Ray as intolerable is to impute liability to the company simply because of broad economic conditions which were beyond the company's control. That imputation exceeds the scope of partial termination.

While adopting the findings of the Committee with the modifications noted by Class II, the district court generated three sets of calculations for the percentage of discharged

employees at Sea Ray between 1989 and 1991, based on each party's interpretation of the layoffs.[3]

| Committee | **Class II** | Class I |
|---|---|---|
| 1989-90: | **1989-90:** | (a) 1989-91: |
| 16.1% | **15.9%** | 32.9% |
| 1990-91: | **1990-91:** | (b) 1989-91: |
| 28.8% | **27.9%** | 36.7% |

Finding no clear error by the district court, we also adopt the percentages generated by Class II. Because we do not find the percentage for either 1989-90 or 1990-91 to be so high as "as to be determinative standing alone," *Kreis*, 833 F.2d at 80, we consider additional facts and circumstances.

This court in *Kreis* considered two additional factors to determine whether a partial termination has occurred: one, the effects on the plan of the exclusion of employees from participation; two, the employer's motives. *See id.* at 79. We similarly apply these factors in the present case. We quickly

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[3]The calculations for the Committee and Class II were generated by the following equation:

$$\%\text{ of involuntary terminations} = \frac{(\text{total reduction of employees}) - (\text{excludable employees})}{\text{total number of participants}}$$

Class II's calculations contain more up-to-date figures on the total reduction of employees for each year.

Class I, which argued that the layoffs between 1989 and 1991 should be analyzed together, used the following equations to generate slightly different percentages:

$$\text{(a) \% of involuntary terminations} = \frac{(\text{terminees in Class I}) + (\text{fully vested participants})}{\text{participants (6/30/89)} + (\text{additional participants over period})}$$

$$\text{(b) \% of involuntary terminations} = \frac{(\text{total reduction}) - (\text{excludable employees})}{\text{total number of participants}}$$

dismiss the first factor, as none of the parties allege that the layoffs at Sea Ray between 1989 and 1991 financially impaired the Plan. For the second factor, we look to see whether the Committee initiated the layoffs to generate profit from the forfeitures from non-vested employees, either for itself or a third party. Evidence of this type of profit "supports but is not sufficient for a finding of bad faith." *Id.* at 80. Nonetheless, we can similarly dismiss this factor, as Class I does not contend that Sea Ray was motivated by improper motives in terminating the employees.

We are left to decide whether the Committee's determination that a partial termination did not occur at Sea Ray between 1989 and 1991 was arbitrary and capricious. The arbitrary and capricious standard is the least demanding form of judicial review and is met when it is possible to "offer a reasoned explanation, based on the evidence, for a particular outcome." *Davis* 887 F.2d. at 693 (quoting *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir.1985)).

We find that the Committee's determination regarding the partial termination issue was neither arbitrary nor capricious. The Committee made its decision only after carefully deliberating both the governing legal standards of partial terminations and Sea Ray's actions in light of these standards. Given its calculation of the percentage of terminations — both years were below 30 percent — and the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated.

## V.

For the reasons stated above, we **affirm** the district court's grant of summary judgment in favor of the Committee and Class II.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED
Jul 7 1 05 PM '97
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY____ DEP. CLERK

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,

Plaintiffs,

v.

DANIEL ROBINSON, ET AL. (CLASS 1)

Defendants,

No. 3:92-cv-587

**MEMORANDUM AND ORDER**

This is a declaratory judgment action brought by the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Committee), and William J. Barrington, Diane M. Yaconetti, and William R. McManaman, in their capacities as members of that Committee. The Committee seeks a declaratory judgment enforcing the provisions of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Plan), and to determine the rights and liabilities of the parties under the Plan, pursuant to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC or Code). The Committee named as defendants two putative classes. Class I defendants are all of those "former Sea Ray employees (and their

beneficiaries)" who are participants in the Plan, whose service as Sea Ray employees ended between July 1, 1989, and June 30, 1991, and who had an interest in the Plan that was not fully vested when their employment ended. [*See* Doc. No. 60]. Class II defendants are all of the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. [*Id.*]. The Committee seeks a declaration that there has not been a partial termination of the Plan; that members of Class I are therefore not entitled to the accelerated full vesting of their account balances that would flow from a partial termination; and that pursuant to the terms of the Plan, the non-vested portions of the Class I members' account balances should therefore be reallocated to the remaining Plan participants, the members of Class II.

In an exceptionally well-reasoned and well supported report and recommendation (R&R) [Doc. No. 102], the Honorable Thomas W. Phillips, United States Magistrate Judge, recommended that Class I defendants' motion for summary judgment be denied, and that the cross-motions for summary judgment filed by the Committee and the Class II defendants be granted. The Class I defendants filed timely objections [Doc. No. 106] to the magistrate judge's R&R.

The court has very carefully conducted a *de novo* review of the record, the R&R, and the Class I defendants' timely filed objections thereto, and concurs in the magistrate judge's recommendation. Specifically, the court agrees that the percentage of Plan participants terminated was insufficient for a find of a partial termination, such that the Class I defendants' account balances should be reallocated to the remaining Plan participants, the members of Class II.

In analyzing the very difficult issues extant in this case, the magistrate judge first had to wrestle with the familiar, yet difficult, question of the appropriate standard of review to apply to the decision of the Plan's administrator. As noted by the Class II defendants in their response to the Class I defendants' objections to the R&R, contemporaneously with the magistrate judge's deliberations in this case, the Sixth Circuit Court of Appeals decided *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813 (6th Cir. 1996), which supports the magistrate judge's conclusions in the R&R. Suffice it to say that the magistrate judge was clearly correct in his conclusion that the Sea Ray Plan expressly grants the Committee the discretionary power to determine participants' eligibility for benefits or to interpret the terms of the Plan. Therefore, the magistrate judge correctly applied the arbitrary and capricious, rather than the *de novo*, standard of review to the Committee's decision that no partial termination of the Plan had occurred.

The remaining objections of the Class I defendants center on the percentage decline in Plan participants over the relevant Plan years. The Class I defendants complain generally that the Committee failed to take into account that Ray Industries, Inc. (Sea Ray Company), a wholly-owned subsidiary of Brunswick Corporation, as apparently contrary to the rest of the boating industry, did not experience major variations in its business cycle until 1989. At that time, the Class I defendants contend, Sea Ray Company began to experience losses and concomitant declines in employment that must be considered as one major corporate event.

However, it is clear that the Committee discussed at length the nature of the down-sizing that was occurring and had occurred in the Sea Ray Company's employment and the corresponding declines in Plan participation. Indeed, it was entirely reasonable for the magistrate judge to conclude that there were two major corporate events precipitating the decline

in Plan participation. First, a downturn in the pleasure craft industry occurred well before a subsequent downturn in the production of yachts, which undisputedly occurred as a result of the so-called luxury tax that was imposed upon large and costly boats. Thus, treating the years separately, and the major corporate events as having distinct causes, was entirely reasonable. As the magistrate judge recognized, there simply was no correlate with the two events.

Furthermore, when viewed in this fashion, the major corporate events and the different years over which they occurred fail to yield a termination of 50% or more of the Sea Ray Company's employees in any given year.

In short, the Class I defendants fail to raise in their objections any issues that were not fully and adequately addressed by the magistrate judge in the R&R. Because the reasons why judgment should be entered for the Committee and the Class II defendants have been fully and accurately articulated by the magistrate judge, the issuance by this court of a detailed opinion would be duplicative and serve no useful purpose. Accordingly, the R&R is ACCEPTED IN WHOLE pursuant to 28 U.S.C. § 636(b)(1), whereby the Class I defendants' motion for summary judgment [Doc. No. 74] is DENIED; the Committee's and the Class II defendants' motions for summary judgment [Doc. Nos. 82 and 84] are GRANTED; all remaining motions are DENIED AS MOOT; and this case is DISMISSED WITH PREJUDICE. The Clerk is DIRECTED to close this case.

**ENTER:**

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James H. Jarvis
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

FILED
Oct 30 9 11 AM '96
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY ____ DEP. CLERK

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| ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL., | ) | |
| Plaintiffs, | ) | |
| v. | ) | No. 3:92-cv-587 (Jarvis/Phillips) |
| DANIEL ROBINSON, ET AL. (CLASS 1) | ) | |
| Defendants, | ) | |

## REPORT AND RECOMMENDATION

This matter is before the undersigned pursuant to 28 U.S.C. § 636(b), the Rules of this Court, and by order of reference from the Honorable James H. Jarvis, United States District Judge [Doc. 74].

The Class I defendants in this action have moved the court for entry of summary judgment in their favor [Doc. 74]. Plaintiffs have filed a cross-motion for summary judgment [Doc. 82], as have the Class II defendants [Doc. 84]. The Class I defendants have replied [Doc. 91]. Plaintiffs and Class II defendants have replied in support of their cross-motions for summary judgment and in opposition to the Class I motion for summary judgment [Docs. 93, 96, 97]. The Class I defendants have filed a supplemental brief [Doc. 95].

## BACKGROUND

On August 25, 1992, plaintiffs, the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Committee), and William J. Barrington, Dianne M. Yaconetti, and William R. McManaman, in their capacities as members of that Committee, filed this action seeking a declaratory judgment to enforce the provisions of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Plan), and to determine the rights and liabilities of the parties under the Plan, under the Employee Retirement Income Security Act (ERISA), and under the Internal Revenue Code (IRC).[1] Plaintiffs named as defendants two putative classes. Class I defendants are all those former Sea Ray employees (and their beneficiaries) who were participants in the Plan, whose service as Sea Ray employees ended between July 1, 1989 and June 30, 1991, and who had an interest in the Plan that was not fully vested when their employment ended. Memorandum and Order of April 13, 1993. Class II defendants are all the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. *Id.* Plaintiffs seek a declaration that there has not been a partial termination of the Plan, that members of Class I are therefore not entitled to the accelerated full vesting of their account balances that would flow from a partial termination, and that pursuant to the terms of the Plan, the nonvested portions of the Class I members' account

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[1]To be considered a qualified trust under the tax code, a pension plan must provide that, upon its termination or partial termination, the rights of all affected employees to benefits accrued become nonforfeitable. 29 U.S.C. § 411(d)(3).

balances should therefore be reallocated to the remaining Plan participants, the members of Class II.[2]

The central legal issue in this case is whether, as a result of reductions in employment levels at Sea Ray from 1989 to 1991, there has been a partial termination of the Sea Ray Plan. It appears that the determination of partial termination shall be made solely on the finding as to whether the percentage of participants terminated was so large as to cause a partial termination of the Plan.

The Plan, a defined contribution stock bonus and profit-sharing plan, was established under the provisions of ERISA, and, for purposes of determining whether there has been partial termination, is controlled by the provisions of the Plan itself and by regulations promulgated under the IRC. Plan § 1; 29 U.S.C. § 1002(34). Plaintiffs are the administrators of the Plan; the Committee is a fiduciary under ERISA and is authorized by the Plan to exercise "all powers necessary to enable it to administer the Plan," including "determining the appropriate allocations to Participants' Accounts" and "construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code; . . ." Plan § 16(c). All of the contributions to the Plan are made by Sea Ray, who deducts the contributions as salary expense for tax purposes. IRC § 404. The Plan's assets are allocated to the individual accounts of the participants and the benefits of each participant are "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." *Id.*

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[2]Class II defendants have a similarity of interest with plaintiffs.

While Sea Ray begins making contributions to the Plan on behalf of employees after one year of service,[3] those employees do not become fully vested in their account balances (*i.e.*, they do not fully "own" their account balances) until they have been with the company for seven years. Vesting occurs gradually:

| Credited Service | Vested (or Nonforfeitable) % |
|---|---|
| Less than 3 years | 0% |
| 3 years | 20% |
| 4 years | 40% |
| 5 years | 60% |
| 6 years | 80% |
| 7 years | 100% |

Plan § 10. ERISA expressly permits gradual vesting using this formula. 29 U.S.C. § 1053(a)(1)(B).

Under normal circumstances, if an employee leaves Sea Ray prior to completing seven years of service, the nonvested (or forfeitable) portion of his or her account balance is reallocated among the remaining Plan participants. Plan §§ 6, 10. However, under the terms of § 19 of the Plan, if there has been a partial termination of the Plan, the account balances of the participants affected by the partial termination would become fully vested (nonforfeitable), and the terminated employees would be entitled to retain their full account balances without regard to years of service. In this case, if there has not been a partial termination, then the nonvested

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[3]A "year of service" means a 12-month period beginning on an employee's employment date or anniversaries of the employment date in which an employee is credited with at least 1000 hours of service [Coll. Ex. 15].

portion of the account balances of the Class I participants are forfeited and must be reallocated among the remaining (Class II) participants in the Plan.[4]

At its June 12, 1992 meeting, the Committee discussed the partial termination question and the governing legal standards. Minutes of June 12, 1992 Committee Meeting. In particular, the following points were noted:

- Whether a partial termination occurs within the meaning of the Internal Revenue Code is determined on the basis of all the facts and circumstances.

- The historic application of the rule focused primarily on whether a failure to vest terminated participants would result in a reversion to the employer or discrimination in favor of highly compensated employees.

- In more recent years, there has been a greater emphasis by both the IRS and the courts on the percentage decline and a lesser emphasis on whether the decline resulted in a reversion or discrimination.

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[4]When Congress enacted ERISA, it codified existing regulations which, interpreting the plan termination provisions of the prior statute, required vesting of benefits if a plan was partially terminated. Those provisions were incorporated into the tax code which provides that, for a plan to qualify for tax benefits, it must provide that "upon its termination or partial termination, the rights of all affected employees to benefits accrued to the date of such termination . . . are nonforfeitable." 26 U.S.C. § 411(d)(3).

- The fact that a decline in participation is attributable to causes beyond the control of the employer may not by itself avoid the possibility of a partial termination.

- Case law is not settled as to the appropriate methodology to be employed in determining whether a decline in participation is significant and whether a significant decline alone will result in a partial termination.

- Some courts have held that the issue of whether a partial termination has occurred is a matter of law to be determined by the court and that neither an employer determination nor an IRS determination is entitled to deference.

- A court's determination as to whether a partial termination has occurred is likely to have a significant impact on an IRS determination, but would not be binding on the IRS unless the IRS had voluntarily joined the suit or the suit was an appeal of a final administration by the IRS.

*Id.* The Committee determined at the June 26, 1992 meeting that in light of all of the facts and circumstances, there had not been a partial termination of the Plan. Minutes of June 26, 1992 Committee Meeting.

HISTORY

Sea Ray was founded in the late 1950s by C.N. Ray in Oxford, Michigan. Over the years, the company expanded into a full line of pleasure craft, generally grouped into three

categories: sport boats, sports cruisers, and yachts [William J. Barrington Dep. at 72].[5]

Sea Ray began to expand in the late 1960s, building a facility in Phoenix, Arizona, to build sport boats and sport cruisers; soon the corporate headquarters was moved there [Barr. Dep. at 67, 71-72]. In the early 1970s, Sea Ray built a plant at Merritt Island, Florida, to produce larger sport cruisers and eventually sport yachts [Barr. Dep. at 72]. In 1978, Sea Ray designed a plant in Knoxville, Tennessee, to build small boats known as runabouts. This plant later began producing sport cruisers. Soon after, the company built a plant on Tellico Lake near Knoxville, designed to build small sport boats [Barr. Dep. at 71-72]. In the Spring of 1985, the corporate headquarters was moved from Phoenix to Knoxville [Barr. Dep. at 67]. In this time period, a plant was built at Palm Coast, Florida, to build large sport yachts. Soon thereafter, the Cherokee Cove plant, designed to build fast, upscale sport craft known as performance boats, was built on Tellico Lake across a cove from the Tellico plant [Barr. Dep. at 73].

In late 1986, Sea Ray was purchased by the Brunswick Corporation, but continued to operate as a separate unit, making its own business decisions. Sea Ray became a division of the Marine Group within Brunswick, which included the Mercury Marine, Mercury Power Boat, and U.S. Marine divisions [Barr. Dep. at 85]. Also in 1986, to serve the European market, Sea Ray purchased and renovated a plant in Cork, Ireland [Barr. Dep. at 73-74].

In 1988, Sea Ray purchased and renovated a plant at Fort Mill, South Carolina, to produce small sport boats. At about

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[5]At the time of the deposition, Mr. Barrington was the President and Chief Executive Officer of Sea Ray.

the same time, another plant was built in Knoxville, the Riverview plant, to build small sport yachts [Barr. Dep. at 73-74]. The year 1988 also saw the last plant to be built by Sea Ray, a facility at Sykes Creek, Florida, near the Merritt Island plant. This plant produced large yachts [Barr. Dep. at 74].

As exhibited by this history of Sea Ray, growth in the boating industry overall was unprecedented during the 1980s. Growth surged an average of 35 percent per year from 1983 through 1986, and sales remained at historically high levels from 1986 through 1988. From 1985 to 1988, the number of boats sold by Sea Ray increased substantially. Sea Ray added $100 million in volume to its business every year. As it did, it increased its production capacity, as described above, by building or acquiring plants [Barr. Dep. at 84].

As of July 1, 1985 (a year in which Sea Ray sold 12,456 boats), there were 1,501 Plan participants employed at seven Sea Ray locations [Complt. ¶ 50].

| Division | Participants |
|---|---|
| Oxford | 377 |
| Phoenix | 259 |
| Merritt Island | 303 |
| Knoxville | 294 |
| Tellico | 114 |
| Palm Coast | 21 |
| Ray Indust. Knoxville Hdqtrs. | 133 |
| TOTAL: | 1,501 |

By July 1, 1989, Sea Ray had expanded to thirteen locations and the number of Plan participants had increased to 3,832 [Complt. ¶ 51].

| Division | Participants |
|---|---|
| Oxford | 506 |
| Phoenix | 239 |
| Merritt Island | 433 |
| Knoxville | 474 |
| Tellico | 426 |
| Palm Coast | 438 |
| Cherokee cove | 327 |
| Product Devel. & Eng. Merritt Island | 145 |
| Fort Mill | 76 |
| Trans. Div. Knoxville | 79 |
| Riverview | 217 |
| Sykes Creek | 58 |
| Ray Indust. | 58 |
| TOTAL: | 3,832 |

Sea Ray management monitored trends in the marine industry, as experience had shown that such trends reflected what Sea Ray could expect as a company. Further, Sea Ray management knew that cycles in the marine industry are closely related to national economic cycles; declines in the marine industry are a lot further down and highs are a lot further up.[6] Sea Ray paid particular attention to retail activity at the dealer level; the company built boats in response to dealer orders, which were contingent and could be cancelled at any time [Barr. Dep. at 77-78].

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[6]Mr. Barrington indicated in his deposition that the cycles generally come in ranges of five to ten years, moving up for a period of three to five years and moving down for a period of three to five years. He stated a belief that this trend has been in existence since the 1970s to today [Barr. Dep. at 32].

For the model year 1989, which began July 1, 1988, retail sales ran 22 percent ahead of the previous year through February 1989. However, in March and April 1989, retail sales came in 33 percent below the previous year. Sea Ray had not seen in many years a decline in sales like it saw in March and April 1989 [Barr. Dep. at 135-136]. The decline in sales was across all product lines except the yachts, which continued to sell relatively well until 1990, when the federal luxury tax that targeted high ticket consumer goods went into effect [Barr. Dep. at 39, 86]. By June 30, 1990 (a year in which Sea Ray sold 14,343 boats), the number of Plan participants was 3,060 [Complt. ¶ 52].

| Division | Participants |
|---|---|
| Oxford | 315 |
| Phoenix | 193 |
| Merritt Island | 430 |
| Knoxville | 494 |
| Tellico | 569 |
| Palm Coast | 411 |
| PD&E | 168 |
| Trans. Div. | 65 |
| Sykes Creek | 88 |
| Ray Indust. | 327 |
| TOTAL: | 3,060 |

For the fiscal year ending June 30, 1991, there were 1,968 Plan participants [Complt. ¶ 53].

| Division | Participants |
|---|---|
| Phoenix | 171 |
| Merritt Island | 323 |
| Knoxville | 360 |
| Tellico | 348 |
| Palm Coast | 215 |
| PD&E | 128 |
| Trans. Div. | 49 |
| Sykes Creek | 116 |
| Ray Indust. | 259 |
| TOTAL: | 1,968 |

Total sales for Sea Ray during this entire time frame are as follows:

| YEAR | UNITS SOLD |
|---|---|
| 1985 | 12,456 |
| 1986 | 15,916 |
| 1987 | 22,355 |
| 1988 | 24,538 |
| 1989 | 23,214 |
| 1990 | 14,343 |
| 1991 | 10,542 |

*See* Complt. ¶ 49.

LAYOFFS
MAY 1989

Sea Ray's initial reaction to the sales downturn came in the form of a temporary layoff in May 1989 [Barr. Dep. at 136]. On May 22, 1989, official notice was issued from corporate headquarters that 10 percent of the 1,900 Sea Ray employees in East Tennessee would be temporarily laid off [Coll. Ex. 2 or

Press Releases]. The Sea Ray press release cited a decline in retail sales as the reason for the layoffs [*See* Ex. 24].

LAYOFFS 90 DAYS PRIOR TO JULY 27, 1989

| Plant | Total Employment on 5/32/89 | Layoffs through 4/13/89 | Total Employment on 7/12/89 | % Laid off Period |
|---|---|---|---|---|
| Oxford | 567 | 93 | 470 | 16.4% |
| Phoenix | 313 | 55 | 255 | 17.5% |
| Merritt Island | 564 | 00 | 564 | 0.0% |
| Knoxville | 514 | 47 | 458 | 9.1% |
| Tellico | 547 | 40 | 495 | 7.3% |
| Palm Coast | 54 | 00 | 541 | 0.0% |
| Cherokee Cove | 401 | 25 | 360 | 6.2% |
| Fort Mill | 144 | 00 | 144 | 0.0% |
| Riverview | 298 | 65 | 228 | 21.8% |
| Sykes Creek | 139 | 00 | 139 | 0.0% |
| | 4,028 | 325 | 3,654 | 8.0% |

Class I Chart [Doc. 75]; Figures taken from Sea Ray's Head Count Analysis, Coll. Ex. 7.

JULY 1989

On July 17, 1989, Sea Ray's corporate headquarters issued written directions to affected plant managers on how to handle additional layoffs (employees to be laid off were to be notified on July 20th and laid off on July 27th) [Coll. Ex. 3-A, Internal Management Documents]. On July 19, 1989, Brunswick issued a press release noting that 20 percent, or 4,000 employees of its Marine Group workforce would be laid off, with Sea Ray identified as part of that group [Coll. Ex. 2, Press Releases]; Brunswick indicated that the layoffs resulted from a significant reduction in orders from dealers [Ex. 24]. The next day, Sea Ray issued a notice from its headquarters announcing the temporary layoffs [Coll. Exs. 2, 4]. Sea Ray attributed the layoffs to the reduction in retail sales and an unprecedented field inventory build-up [Ex. 24].

On July 21, 1989, notices were also issued to the employees laid off in May, advising them that their layoffs would continue [Ex. 24]. On July 24, 1989, Sea Ray announced the closing of the Fort Mill, South Carolina plant. The press release noted that approximately 140 employees would be affected by the Fort Mill closing, in addition to the approximately 960 employees to be laid off at other locations on July 27th [Coll. Exs. 2, 4]. The field inventory build-up was cited as the reason for the action [Ex. 24].

LAYOFFS ON JULY 27, 1989

| Plant | Total Employment on 7/27/89 | Layoffs 7/27/89 | % Laid off 7/27/89 | % Laid off Between 4/21 - 7/27/89 |
|---|---|---|---|---|
| Oxford | 470 | 138 | 29.4% | 40.7% |
| Phoenix | 255 | 12 | 4.7% | 17.6% |
| Merritt Island | 564 | 211 | 37.4% | 37.4% |
| Knoxville | 458 | 103 | 22.5% | 29.2% |
| Tellico | 495 | 90 | 18.2% | 23.8% |
| Palm Coast | 541 | 9 | 16.6% | 16.6% |
| Cherokee Cove | 360 | 182 | 50.6% | 51.6% |
| Fort Mill | 144 | 144 | 100.0% | 100.0% |
| Riverview | 228 | 114 | 50.0% | 60.1% |
| Sykes Creek | 139 | -0- | 0.0% | 0.0% |
| | 3,654 | 1,084 | 29.7% | 35.0% |

Class I Chart [Doc. 75]; Figures taken from Sea Ray's Head Count Analysis, Coll. Ex. 7.

AUGUST 1989

On August 14, 1989, Sea Ray issued a press release announcing that the Riverview plant would be consolidated with the Knoxville plant, and that the Cherokee Cove plant would be consolidated with the Tellico plant [Coll. Ex. 2]. No layoffs were expected to result. The actions taken at Riverview

and Cherokee Cove were described on September 27, 1989, as temporary closings.

On August 22, 1989, Sea Ray issued a notice to employees to the effect that the company's position was that failure to return to work after recall would be treated as a voluntary termination [Coll. Ex. 3-A].

An August 25, 1989, internal memorandum demonstrates Sea Ray's acknowledgement of the potential effect of the mid-1989 layoffs on the Pension Plan:

> I spoke with Anna Jeans of Ron Ludwig's office regarding the effect, if any, the recent layoffs would have on the vesting schedule under our ESOP/Profit Sharing Plan. Anna indicated that the magic number adopted by most courts in determining whether or not a partial termination of the plan had occurred would be a permanent termination of 20% or more of the plan participants. I told her that although our layoffs probably exceeded the 20% initially, we anticipated that the majority of the laid-off employees would be brought back (even within six months), so that ultimately the actual number of terminated employees would be expected to be far less than the 20% threshold. The penalty for a partial termination would be to give the terminated employees immediate vesting in their plan accounts.
>
> It was agreed that we would look at the situation later in the year to review the extent to which we had rehired laid-off employees, so as to determine whether

> or not the 20% threshold level had been violated. Unless our business takes a dramatic downturn in the next several months it seems highly unlikely that we will run afoul of the partial termination rules.

[Coll. Ex. 3-A].

NOVEMBER 1989

On November 16, 1989, official notice was sent to employees laid off before July 27, 1989, that they were being converted from temporary layoff to permanent layoff [Coll. Ex. 3-A].

FEBRUARY 1990

On February 20, 1990, corporate headquarters sent a notice to plant managers directing them to notify the employees temporarily laid off on July 27, 1989, and who had not returned to work through recall or rehire, that they were permanently laid off [Coll. Ex. 3-A].

JULY 1990

On July 6, 1990, notices of permanent, not temporary, layoffs were sent to employees and to state and local officials. At the Knoxville and Tellico plants, 139 employees were to be laid off; at the Palm Coast plant, 74 employees were to be laid off; and at the Phoenix plant, 20 employees were to be laid off. Figures on the number of layoffs at the Merritt Island and Oxford plants were not given [Coll. Ex. 8, July '90 - June '91 Layoff Notices, and Coll. Ex. 4].

AUGUST 1990

On August 6, 1990, it was announced that the corporate office workforce in Knoxville would be reduced by 10-15 percent [Coll. Ex. 3-A].

SEPTEMBER 1990

On September 28, 1990, a Sea Ray press release stated that roughly 14 percent of the corporation's employees would be laid off because of continued slow sales [Coll. Ex. 2]. On the same day, permanent layoff notices were issued to employees at the Merritt Island (35), Palm Coast (95), Tellico (97), Oxford (68), Phoenix (8), and Knoxville (77) plants. The remainder (54) were from corporate headquarters in Knoxville [Coll. Ex. 8]. Sea Ray characterized most of the layoffs as permanent, since the company continued to see a slide in the market. The permanent layoffs were kept on a list for rehire; however, there was very little opportunity for rehiring anyone [Barr. Dep. at 104-106].

NOVEMBER 1990

On November 9, 1990, it was announced that effective January 9, 1991, the Oxford plant would be closed, affecting 200 employees [Coll. Ex. 4].

DECEMBER 1990

On December 7, 1990, notice of layoff was given to Palm Coast employees. On March 1, 1991, Merritt Island employees were notified of layoffs, effective March 8, 1991 [Coll. Ex. 8].

MAY 1991

On May 24, 1991, a corporate press release announced that a number of Merritt Island employees were to be laid off due to continuing declining sales and the effects of the luxury tax [Coll. Ex. 2]. Subsequently, on May 28, 1991, Sea Ray notified Florida officials that 106 Merritt Island employees would be laid off due to low retail sales and the luxury tax [Coll. Ex. 4].

AUGUST 1992

In August 1992, notices of permanent layoff were announced at the Knoxville and Tellico plants, affecting 159 employees.

DECEMBER 1992

Notice of another layoff was sent to Tennessee officials on December 14, 1992 [Coll. Ex. 4], affecting 13 employees at the Transportation Division.

ADDITIONAL BACKGROUND ON SEA RAY
THE CORPORATE PERSONNEL RECORD SYSTEM

Within Sea Ray during the relevant time period, there was no one figure or manager in charge of personnel matters. It was not until early 1993 that the position of Director of Human Relations, holding central responsibility for all corporate personnel matters, was created [Barr. Dep. at 107].

Thus, each Sea Ray plant was operated separately as a profit center and the plant's manager was given the responsibility for developing his own personnel policies. Since each facility had its own written personnel policies, no uniformity existed from plant to plant within the corporation [Barr. Dep. at 102-03]. Each plant had its own criteria for determining who got laid off, with some going strictly by employee capability and evaluations, and others considering seniority by departments or seniority by plant [Barr. Dep. at 112-13]. Personnel records for hourly employees were maintained only at the plant level, not at the corporate level, and the process of transmitting an employee's termination report to headquarters was informal [Barr. Dep. at 111, 115].

COS FORM

Each facility did use a form known as a "Change of Employee Status" (COS) form, the basic document containing

an employee's work history [LuAnn Jarnigan Dep. at 13-15].[7] At the time of termination, every terminated employee was to have had an exit interview conducted by the individual in charge of personnel matters at the facility and to have signed the COS form [Jarn. Dep. at 31]. Information on the form was filtered up through the system later and included in other forms and reports not signed or seen by the employee [Jarn. Dep. at 55]. The COS form, however, was not considered an Employee Stock Ownership Plan (ESOP) reporting document; the census is the base ESOP document [Jarn. Dep. at 55]. The census lists, compiled each year on June 30, contain the names of all Sea Ray employees. Figures from the census forms are transposed to an IRS 5500 Form submitted for reporting purposes [Jarn. Dep. at 55].

On June 30, 1989, there were 4,425 total corporate employees. On June 30, 1990, there were 3,309 total corporate employees. On June 30, 1991, there were 2,028 total corporate employees [*See* Coll. Exs. 12-14].

ALL SEA RAY EMPLOYEES

| Plant/Division | 6/30/89 | 6/30/90 | 6/30/91 |
|---|---|---|---|
| Fort Mill | 127 | Closed | Closed |
| Cherokee Cove | 339 | Closed | Closed |
| Riverview | 275 | Closed | Closed |
| Oxford | 510 | 317 | Closed |
| Knoxville | 504 | 498 | 369 |
| Tellico | 502 | 576 | 349 |
| Merritt Island | 528 | 472 | 331 |
| Palm Coast | 521 | 540 | 216 |

[7]At the time of the deposition, Ms. Jarnigan was the Director of Human Relations at Sea Ray.

| | | | |
|---|---|---|---|
| Phoenix | 275 | 244 | 190 |
| Sykes Creek | 125 | 98 | 133 |
| PD&E | 218 | 168 | 130 |
| Trans. Div. | 87 | 69 | 49 |
| Ray Indust. | 414 | 327 | 261 |
| TOTAL: | 4,425 | 3,309 | 2,028 |

[Doc. 75, Class I Chart (developed from Census lists)]. As noted earlier, as of June 30, 1989, there were 3,832 Plan participants. On June 30, 1990, there were 3,060 Plan participants. On June 30, 1991, there were 1,968 Plan participants [Complt. ¶¶ 51-53; Exs. 12-14].

ALL PLAN PARTICIPANTS

| Plant/Division | 6/30/89 | 6/30/90 | 6/30/91 |
|---|---|---|---|
| Fort Mill | 76 | Closed | Closed |
| Cherokee Cove | 327 | Closed | Closed |
| Riverview | 217 | Closed | Closed |
| Oxford | 506 | 315 | Closed |
| Knoxville | 474 | 494 | 360 |
| Tellico | 426 | 569 | 348 |
| Merritt Island | 433 | 430 | 323 |
| Palm Coast | 438 | 411 | 215 |
| Phoenix | 239 | 193 | 170 |
| Sykes Creek | 58 | 88 | 116 |
| PD&E | 145 | 168 | 128 |
| Trans. Div. | 79 | 65 | 49 |
| Ray Indust. | 414 | 327 | 259 |
| TOTAL: | 3,832 | 3,060 | 1,968 |

[Doc. 75, Class I Chart (developed from Census lists)]. The total number of Plan participants for the 1989-1990 Plan year

is 4,084 (the number at the beginning of the year, 3,832, plus the number added during the year, 252). The total number of participants for the 1990-1991 Plan year is 3,111 (the number at the beginning of the year, 3,060, plus the number added during the year, 51).[8] For the entire two-year period, the total number of participants is 4,139 (the number at the beginning of the period, 3,832, plus the number added during the period, 303) [*See* Docs. 85, 91].

STANDARD OF REVIEW

Class I argues that it is appropriate and necessary for the court to review *de novo* the Plan Committee's decision that in light of all the facts and circumstances, there had not been a partial termination of the Plan.

It is the plaintiffs' position that the Supreme Court has mandated that substantial deference be given to a plan administrator's exercise of discretionary decision-making power. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111-112, 115, 109 S. Ct. 948 (1989). An administrator's decision to deny a claim for plan benefits based upon interpretation of the plan will be upset only if it is arbitrary and capricious, provided "the plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115; *see also, Whisman v. Robbins*, 55 F.3d 1140, 1143-1144 (6th Cir. 1995); *Sutter v. BASF Corp.*, 964 F.2d 556, 561 (6th Cir. 1992). According to plaintiffs, under *Firestone*, the Committee's determination that a partial termination did not occur should be accorded deference and upset only if arbitrary and capricious.

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[8]Class I has provided a chart and lists of the individuals added to the Plan during the relevant time frame [Doc. 85, Ex. 3].

Class I argues that the Committee's decision turned on a question of law. While section 19 of the Sea Ray Plan permits a determination by the Committee that the Plan has been partially terminated, Class I notes that the Plan contains no definition of "partial termination." In determining whether the Plan was partially terminated, Class I states that reference must be made to controlling statutes, implementing regulations, and interpretative decisions of the courts and administrative officials. Thus, Class I contends that when an eligibility determination by plan administrators turns on a question of law, the courts have not hesitated to apply a *de novo* standard of review. *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1049 (2nd Cir. 1990) (Weil II), vacated in part on other grounds upon rehearing, 933 F.2d 106 (2nd Cir. 1991) (Weil III); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 148-49 (3rd Cir. 1987), *aff'd* in part and *rev'd* in part on other grounds, 489 U.S. 101, 109 S. Ct. 948 (1989). According to Class I, therefore, because a *de novo* standard of review is appropriate, the determination by the Plan Committee that a partial termination had not occurred is not subject to deference.

In reply to Class I's argument, the Committee contends that the Sixth Circuit, in several cases decided since *Firestone*, has made it clear that even when eligibility determinations turn on questions of law, the arbitrary and capricious standard applies if the plan documents give the administrators the discretion to construe and interpret the plan. *See Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S. Ct. 1924 (1990); *Moos v. Square D Co.*, 72 F.3d 39, 41 (6th Cir. 1995); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1247-1248 (6th Cir. 1991); *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 458-495 (6th Cir. 1991). According to plaintiffs, the Sea Ray Plan grants the Committee broad discretion to

exercise "all powers necessary to enable it to administer the Plan." Plan § 16(c). These specifically include powers to "determin[e] the appropriate allocations to Participants' Accounts" and to "constru[e] and interpre[t] the Plan and the Trust Agreement." *Id.*; Complt. ¶¶ 3,5. The Committee states that such language satisfies *Firestone* and requires the use of the abuse of discretion standard. *See, e.g., Sutter*, 964 F.2d at 559, 562 (administrator's exercise of "powers to construe the Plan and . . . determine all questions that may arise thereunder relating to [eligibility and] the amount of benefits to which any Participant . . . may become entitled "is reviewed "under an arbitrary and capricious standard); *Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 658 (10th Cir. 1990) (Plan provision empowering administrator to "construe and interpret" plan "carries with it not only the authority, but also the discretion, to decide questions of plan interpretation"). The Committee notes that its decisions in this matter involved the "constru[ction] and interpret[ation] [of] the Plan" and an exercise of its explicit power to "determin[e] the appropriate allocations to Participants' Accounts" [Plan §§ 19, 16(j)].

The Sixth Circuit has recognized that "discretion is the exception, not the rule and that the arbitrary and capricious standard does not apply unless there is a clear grant of discretion to determine benefits or interpret the plan." *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1373 (6th Cir. 1994) (emphasis in original) (*citing Anderson v. Great West Life Assurance Co.*, 942 F.2d 392, 395 (6th Cir. 1991)); *see Johnson v. Eaton Corp.*, 970 F.2d 1569, 1571 (6th Cir. 1992) ("This circuit has interpreted *Firestone* to require that the plan 'expressly' give discretionary authority to the administrator"). The court in *Wulf* also recognized that discretion is not an all or nothing thing. *Id.* Rather, a plan can give administrators discretion with respect to some decisions, but not others. The

administrator then, has only the amount and type of discretion granted by the plan and no more. *Id.*

If the administrator or fiduciary has not been given discretionary authority, then any actions are to be reviewed under a *de novo* standard. When applying the *de novo* standard, the court is to interpret the terms of the plan "without deferring to either party's interpretation." *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1377 (6th Cir. 1996) (citations omitted). Under the *de novo* standard, the court "simply decides whether or not it agrees with the decision under review." *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990). The court is to do so on the basis of the record before the administrator. *Id.* Further, under the *de novo* standard, the court's goal is to determine which interpretation of the plan is more likely to carry out the intentions of the parties. *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 122 (6th Cir. 1989), *cert. denied*, 495 U.S. 905 (1990).

If the administrator or fiduciary has been given discretionary authority to determine eligibility for benefits or to construe the terms of the plan, then the deferential standard of arbitrary and capricious applies. The arbitrary and capricious standard is the "least demanding form of judicial review of administrative action." *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989).

Two issues arise when applying the arbitrary and capricious standard. The first concerns the bounds of the administrator's authority. The deferential standard of review only applies when the administrator or fiduciary acts within the bounds of discretion given. *Auto Club Ins. Ass'n v. Health and Welfare Plans, Inc.*, 961 F.2d 588, 593 (6th Cir. 1992). That is, the deferential standard of review does not apply if the administrator or fiduciary has exceeded the bounds of authority granted by the plan.

The second issue that arises when applying the arbitrary and capricious standard is reasonableness. The *Davis* court noted that "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Davis*, 887 F.2d at 693 (citation omitted). The Sixth Circuit has further stated that if the trustee has power to construe disputed terms, the interpretation, if reasonable, will not be disturbed. *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1248 (6th Cir. 1991). The *Wells* court also indicated that if the administrator's interpretation and the rejected applicant's interpretation are both reasonable, the administrator's interpretation must be allowed to control. *Id.* According to another court, determining "whether the plan administrator's decision was arbitrary and capricious means determining whether it was rational and in good faith, not right." *Dials v. SMC Coal & Terminal Co.*, 891 F. Supp. 373, 376 (E.D. Ky. 1995) (*citing Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989).

An issue that may affect which standard of review is applicable is whether the administrator's decision is based on a question of law. The Second Circuit has ruled that the *de novo* standard applies unless the plan grants discretionary authority to determine the eligibility of benefits or to construe the terms of the plan. However, when the eligibility determination turns on a question of law, courts should apply the *de novo* standard. *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1048-49 (2nd Cir. 1990) (Weil II). In that case, the court ruled that the determination of whether a partial termination had occurred was a question of law, and therefore the fiduciary's decision was not subject to deference. *Id.* This approach has been followed by the Fourth Circuit, *Gauer v. Connors*, 953 F.2d 97, 99-100 (4th Cir. 1991), and the Tenth Circuit, *Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 657 (10th Cir. 1990).

The Sixth Circuit appears to have implicitly rejected this approach. One of the issues presented for review in the *Davis* case was whether the district court erred in applying the arbitrary and capricious standard because the question of whether the decedent was an "employee" at the time of his death was a question of law. 887 F.2d at 693. The Sixth Circuit upheld the district court's application of the arbitrary and capricious standard because the plan at issue had explicitly granted the Retirement Committee the discretion and authority to interpret its terms. *Id.* at 693-94. Therefore, under *Firestone*, the district court's application of the arbitrary and capricious standard was correct. The court neither stated nor implied that limitations in addition to those imposed by *Firestone* should be placed on the determination of the standard of review.

The Sea Ray Plan expressly grants the Committee the discretionary power to determine the eligibility for benefits or to interpret the terms of the Plan. Section 16(c) of the Sea Ray Plan contains an enumeration of the Committee's powers and duties. That section begins, "The Committee shall have all powers necessary to enable it to administer the Plan and the Trust Agreement in accordance with their provisions . . . ." In subsection (2), the Committee is authorized to "determin[e] the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid." Then in subsection (7), the Committee is granted the power of "construing and interpreting the Plan and Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code."

By its own terms, the Sea Ray Plan grants the Committee the discretionary power to determine the amount and allocations of benefits under the Plan and to interpret the terms of the Plan. Further, the Plan grants the Committee the power

to adopt rules for administering the Plan consistent with its interpretation of the Plan. Since the Committee's power to adopt rules is incident to its power to interpret the Plan, the Plan grants the Committee more than mere administrative power. Further, since the Plan's grant of authority contains provisions for both the determination of benefits and the interpretation of its terms, this case is distinguishable from *Anderson v. Great West Life Assurance Co.*, where the Sixth Circuit held that the plan's authorization to determine the amount of benefits was not an express granting of authority to interpret the terms of the plan. 942 F.2d at 394-95.

Although the Sea Ray Plan clearly grants the Committee the authority to interpret the term "partial termination" within the Plan, thus triggering the arbitrary and capricious standard of review, Class I defendants argue that this court should nevertheless apply the *de novo* standard, basing their argument on the fact that determining the occurrence of a partial termination is a question of law, which is subject to *de novo* review in other jurisdictions. In *Davis*, the Sixth Circuit held that the district court correctly applied the arbitrary and capricious standard to the committee's interpretation of the term "employee," even though that was a question of law. *Id.*, 887 F.2d at 693. Since this case presents an analogous issue, this court will follow *Davis*, and apply the arbitrary and capricious standard of review to the Committee's decision.

ARBITRARY AND CAPRICIOUS STANDARD

In applying the arbitrary and capricious standard to this case, as noted, two determinations must be made. The first is whether the Committee acted within the bounds of its authority. In this case, there is no dispute that the Committee acted within the bounds of its discretionary authority. The Committee is authorized to interpret the terms of the Plan and the minutes from the Committee's meeting demonstrate that its decision

was based on the definition of a partial termination as the members understood the term.

The second determination to be made in applying the arbitrary and capricious standard to this case is whether the Committee's interpretation of the Plan was reasonable. Although a reasonableness inquiry is not usually very exacting, the complex nature of this case necessitates a more in-depth analysis of the Committee's decision than that normally required.

## THE PARTIAL TERMINATION RULE

The first, pre-ERISA Treasury regulation on the subject of partial termination provided that a "facts and circumstances" test would be applied. Treas. Reg. § 1.401-6(b)(2)(1963). Post-ERISA regulations similarly provide that whether a partial termination has occurred is to be determined on the basis of all the facts and circumstances, including such facts as the exclusion by plan amendment or severance by the employer of a group of employees previously covered by the plan. Treas. Reg. § 1.411(d)-2(b). The Treasury Regulation states as follows:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treas. Reg. § 1.411(d)-2(b)(1). However, the "facts and circumstances" test enunciated in Treas. Reg. § 1.411(d)-2(b)(1) provides "precious little guidance concerning precisely

what facts and circumstances matter and how much." *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). Reference must be made to case law and to the instructions and interpretations of administrative officials.

IRS technical advice memoranda (TAM) issued in the 1960s and 1970s reflected the anti-abuse policy of the partial termination rule. There was a concern that, in the event of a plan termination, forfeitures would be discriminatorily allocated primarily to officers, shareholders and highly compensated employees, or would revert to the employer, and that in either case, the plan would cease to be operated for the exclusive benefit of employees. *See* PS No. 22, 3 Standard Fed. Tax Serv. (CCH) ¶ 6552 (1944); Rev. Rul. 55-186, 1955-1 C.B. 39. The first technical advice memorandum applying the rule after its codification at § 401(a)(7), TAM 6512108240A (Dec. 10, 1965), noted that "[a]s reflected in the Committee Reports . . . the purpose of this provision is to prevent the development of abuses under forfeitable plans," and held that "no partial termination can be said to have occurred unless it can be demonstrated that reallocation of forfeitures among the remaining participants in the plan . . . results in discrimination . . . or in an abuse which section 401(a)(7) is intended to preclude." *Id.* In a 1974 technical advice memorandum, the IRS found no partial termination despite a 50 percent decline in participation in 1969 and further reductions of 49.9 percent in 1970 and 28 percent in 1971. TAM 7411187610A (Sep. 24, 1974).

In Rev. Ruling 55-186, 1955-1 C.B. 39, it was noted that a discriminatory allocation of forfeitures was a concern in the context of a defined contribution plan because amounts previously contributed to such a plan would inure primarily to the benefit of a prohibited group who would be the last to have their employment terminated and who would stand to benefit from the forfeitures arising from the severance of employment

by other participants. Reversions to the employer were a further concern because contributions could be made and deducted in high-profit, high-tax years and later reverted in low-profit, low-tax years, thereby permitting plans to be operated as tax avoidance mechanisms and not for the exclusive benefit of employees. PS No. 22, *supra*.

Prior to the early 1980s, there were only three published revenue rulings directly on point, each of which held that, under its particular fact pattern, a partial termination had occurred. However, those rulings related to situations where there were reductions in participation of 57.6 percent and 70.6 percent and the potential for significant discrimination or significant reversions.

Class I defendants argue for the use of the definition of partial termination used in *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990):

> A partial termination occurs when, in connection with a major corporate event, a significant percentage of employees covered by the plan are involuntarily excluded or terminated from participating in the plan.

Thus, Class I asserts that the "key consideration" in determining whether a partial termination has occurred is the size of the total contraction of the Plan, regardless of the reasons why particular participants may have left the Plan. In calculating that total contraction, Class I regards as "employer-initiated terminations" all employees who left for reasons other than death, disability retirement or normal retirement, including employees who left voluntarily.[9] They base this "total

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[9]According to Class I, if it is then determined that a partial Plan termination has occurred, the beneficiaries of that determination are identified by a separate examination of the circumstances surrounding the

contraction" theory on the Second Circuit's decision in *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (2nd Cir. 1991) (*Weil III*). The *Weil III* court elaborated as follows:

> Having concluded that the congressional purpose behind the partial termination statute is unclear and that the statute is silent regarding the measurement of a partial termination, we next consider whether the IRS' position is based on a permissible construction of § 411(d)(3). In our view, the IRS' interpretation of § 411(d)(3)--that a partial termination occurs when there is a significant contraction of the plan, and therefore, all terminated plan participants must be considered in a partial termination inquiry--is a reasonable construction in light of the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizeable reduction in benefits under the plan"). Those examples suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole. Moreover, the language used in the treasury regulations, which refers to the exclusion of employees who have been covered by a plan, additionally supports the fact that no distinction was made between vested and non-vested plan participants in these sources. We therefore apply the ratio utilized by the IRS and, as the district court found, conclude that the Plan was partially terminated in 1981 when 33.4% of the Plan participants were discharged.

*Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 110 (2nd Cir. 1991) (*Weil III*).

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termination of each Plan participant or category of Plan participants [Doc. 75].

Class I argues that the partial termination rule is intended to protect the employees' legitimate expectations of benefits. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1182-1183 (3rd Cir. 1992); *Amato v. Western Union Intl. Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3rd Cir. 1983). Reliance is placed on *Halliburton Co. v. Commissioner*, 100 T.C. 216 (1993):

> [T]he partial termination rule does not serve exclusively as a sanction for employer abuse, but also serves to protect employees "who would otherwise be left out in the cold after a drastic and sudden change in the plan." *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3rd Cir. 1987). To say that the reason for awarding plan assets to participants in simply to punish employer abuse ignores one of the fundamental purposes of the rules governing qualified plans, the protection of employee retirement benefits. *See* S. Rept. 93-383, at 1 (1973), 1974-3 C.B. (Supp.) 80..

100 T.C. at 227-228.

The Committee argues that the history of the partial termination rule shows that in judging whether a partial termination has occurred, particular weight must be given to the employer's motive in terminating plan participants. According to the Committee, the Sixth Circuit has ruled that a "necessary [inquiry] in determining whether there has been a partial termination focuses on whether the decision maker," here Sea Ray, "excluded the plan participants in a predatory effort to profit" from the Plan. *Kreis v. Charles O. Townley, M.D. & Assoc. P.C.*, 833 F.2d 74, 80 (6th Cir. 1987). In *Kreis*, the Sixth Circuit held "the existence of such bad faith" to be an important element of the facts and circumstances test for a partial termination, "because such consideration will further

ERISA's goal of curbing the abuse of private retirement pension plans." *Id.*[10] The Committee contends that other courts of appeals have similarly concluded that the goal of the partial termination rule is to prevent employer abuse of benefit plans, and that where a "valid business justification[] was the motivation behind the [company's] actions" in terminating plan participants, rather than "impermissible favoritism towards principal beneficiaries of the . . . plan[]" or a desire to capture a reversion of plan assets, no partial termination occurred. *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985). *See also, Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d at 890-891 (approving the ruling in *Babb* that an "independent reason[] why there was not a partial termination" was that termination of plan participants was "justified from a business standpoint and was not made in order to favor the principal beneficiaries of the plan"); *Freemen v. Central States, Southeast & Southwest Areas Pension Fund*, 32 F.3d 90, 92 (4th Cir. 1994) ("The purpose of the [partial termination rule] was to ensure that the deductions [for employer contributions to the plan] were genuine--absent vesting of benefits at termination, surplus money on the plan could revert to the employer, and the employer could thereby achieve a long deferral of income").

The Committee notes that the IRS has issued a Plan Termination Handbook which examines three factors that taken together might result in a finding of partial termination: sharp reduction in levels of plan participation; increase in the possibility of discrimination in favor of officers, shareholders or highly-compensated employees; and the creation or increase

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[10]The Committee contends that the Sixth Circuit's decision in *Kreis* is binding on this court. In *Kreis*, the Sixth Circuit held that the partial termination determination is based on "the percentage of plan participants who are involuntarily excluded from the plan by the participants' employer in connection with a major corporate event." 833 F.2d at 79.

of the possibility that plan assets may revert to the employer. § 252(1)-(8). The Committee admits, however, that the Handbook emphasizes that under the facts and circumstances test, no one factor is determinative and that all of the factors should be considered in each case:

> Please note that the issue of the possibility of reversion, prohibited discrimination, or a reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; however, when each of these issues are considered collectively, they may interrelate in such a way as to reflect a partial termination.

IRS, Plan Termination Handbook § 252(10).

The Committee additionally relies on *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), *aff'd* in part and *rev'd* in part on other grounds, 489 U.S. 101, 109 S. Ct. 948 (1989), in which the Third Circuit held that "a partial termination should be found under § 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to employees." 828 F.2d at 151. Plaintiffs argue that the Third Circuit expressly rejected an argument that the partial termination provision was designed to protect employee expectations to benefits rather than to prevent plan abuse. *Id. See also, Gluck v. Unisys Corp.*, 960 F.2d 1168, 1183-1185 (3rd Cir. 1992); *Rush v. Meridian Bancorp. Inc.*, No. 93-5308 (E.D. Pa. Jan. 19, 1994) (1994 WL 18233) (plaintiffs claiming partial termination occurred "must demonstrate that [the employer] was attempting to gain tax benefits").

The Committee states that the legislative history of ERISA reflects no congressional intent to broaden the focus of the

partial termination rule to protect employee expectancies even where there is no abuse of a plan's tax-qualified status. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. 50 (1973); H.R. Rep. No. 807, 93rd Cong., 2d Sess. (1974), reprinted in 3 Cong. & Adm. News 4670, 4731 (1974); and H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess. 277 (1974), reprinted in 3 Cong. & Adm. News 5038, 5058 (1974).

Thus, plaintiffs urge no partial termination can be found in the complete absence of abuse or even potential for abuse. In the alterative, the Committee contends that considering all of the facts and circumstances, no partial termination occurred [Doc. 93].

As for Class I's reliance on *Weil III* on the total contraction issue, the Committee states that the contention is misplaced. Plaintiffs argue that the issue decided by the Second Circuit in *Weil III* was whether or not fully vested terminees should be included in the partial termination calculation. 933 F.2d at 107. The court of appeals did not consider or decide the "total contraction" argument. To the contrary, according to plaintiffs, *Weil III* repeatedly stated that the employees included in the calculation had been "discharged from their jobs." *Id.* at 107; *see also, Weil II*, 913 F.2d 1045, 1047 (2nd Cir. 1990). In its first *Weil* decision, the court of appeals held that the partial termination calculation should not include employees who "left their employment voluntarily or were dismissed for reasons unrelated to [the corporate reorganization]." 750 F.2d 10, 13 (2nd Cir. 1984). Plaintiffs claim that nothing in *Weil III* (or *Weil II*) changed that holding. Accordingly, Class I's total contraction argument lacks merit [Doc. 93].

The Committee notes that the IRS' Plan Termination Handbook advises that "[t]here is no fixed turnover rate which determines whether a partial termination occurred" and specifically provides that only "employer-initiated

terminations" are to be included in the calculation. IRS, Plan Termination Handbook § 252(6) & (7). Therefore, plaintiffs state that Class I's position that even voluntary quits should be counted among the "employer-initiated terminations" is erroneous.

The Committee notes finally that if the "total contraction" argument could be accepted, the rates of normal turnover would have to be considered.

The Committee again admits that the current IRS Manual gives a more prominent role in the partial termination inquiry to the question whether "a significant percentage of employees were . . . excluded from participating in the plan" than prior IRS pronouncements. IRS, Plan Termination Handbook § 252(6). However, the Committee argues that the IRS continues to recognize that a significant reduction in employment levels does not by itself constitute a partial termination; evidence of plan abuse remains essential. *See id.*, § 252(8) ("factors bearing directly on th[e] [plan termination] issue include whether [the] [p]otential for reversion has been created or increased as a result of participant turnover [and] [t]he possibility for prohibited discrimination has increased"); *id.*, § 252-(10) ("the possibility of reversion, prohibited discrimination, or a reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; however, when each of these issues are considered collectively, they may interrelate in such a way as to reflect a partial termination"); Plan Termination Standards 2 ("a reduction of 20% of the number of employees covered would not by itself cause a partial termination, unless there were additional factors such as prohibited discrimination or potential for reversion").

Class II also notes that in the 1980s, the emphasis of the IRS changed to where greater weight was given as to whether

a "significant percentage of employees were . . . excluded from participating in the plan." IRS, Plan Termination Handbook § 252(6). According to Class II, the IRS has stated that there is a point where the severance percentage could be so great as to preclude other considerations. Rev. Rul. 81-27. However, Class II points out that the Plan Termination Handbook still states that there are factors other than a reduction in participant levels which must be considered: (i) whether the potential for reversion has been created or increased as a result of participant turnover; and (ii) whether the possibility for prohibited discrimination has increased. *Id.* §§ 252(8) & (10).

According to Class II, the case law reveals that when the percentage of plan participants falls within certain parameters, the percentage of employees involuntarily terminated can be solely determinative of whether or not a partial termination has occurred. *See Kreis*, 833 F.2d at 83. In such cases, the existence or nonexistence of employer abuse serves to slide the percentage scale rather than prevent or assure a finding of partial termination. *Id.*, 833 F.2d at 80, 81; *Halliburton Co. v. Commissioner*, 100 T.C. at 232. The Tax Court has acknowledged this sliding scale:

> Between the two extremes, where the percentage drop has not been sufficient in and of itself to establish that a partial termination has occurred, the surrounding facts and circumstances have been considered in conjunction with the percentage drop in order to decide whether the percentage drop is significant.

*Halliburton*, 100 T.C. at 237, *citing Kreis*, 833 F.2d at 79-80. Class II argues that absent a percentage of terminations of less than 20 percent, which would mandate a finding that no partial termination occurred, and a percentage of terminations greater than 50 percent, which would mandate a finding that partial termination had occurred, the body of law requires that a

balancing take place that determines the presence or lack of an abusive intent on the part of the employer. Where there is not a finding of abusive intent, the threshold percentages of termination must necessarily be high to support a finding of partial termination. Where there is evidence of an abusive intent, the threshold percentages of termination may be lowered to prevent the intended abuse [Doc. 85].

Because there are no allegations of employer abuse, or claims that the Plan has been financially impacted by the terminations, Class II contends that the scale should slide towards the upper end of the percentages to determine whether a partial termination has occurred.

The Committee states that the evidence is clear that Sea Ray's terminations of Plan participants were motivated by valid business considerations and not by any abuse of the Plan. Plaintiffs also argue that Sea Ray did not terminate a substantial percentage of Plan participants within the meaning of the Plan language or ERISA; therefore, when terminations relevant to the partial termination issue are correctly counted, the percentage of terminations is not so large as to require the finding of a partial termination absent abuse.

Class I disagrees with the Committee and Class II that finding abuse is an essential element in finding that the Plan has been partially terminated.

Layoffs caused by economic circumstances can cause a partial termination of a plan. *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 160-161 (1984); *Peter M. Boruta, M.D., P.C. v. Commissioner*, T.C. Memo. 1988-172. The fact that there is no evidence of abuse or bad faith will not *per se* insulate the employer from a finding that a partial termination occurred. *Halliburton*, 100 T.C. at 229. Intent to deprive employees of benefits is not essential to a finding of a partial

termination. *Tipton and Kalmbach*, 83 T.C. at 161. Further, the fact that the economic circumstances that led to the layoffs were not the fault of the employer does not preclude the finding of a partial term- ination. *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982).

In *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), the Sixth Circuit created a two-part test to determine if a partial termination has occurred. The first part determines the effects on the plan of the exclusion of employees from participation in the plan. *Id.* at 79. The second part focuses on the motives of the decision maker. *Id.* These two general inquiries may not be the only factors a court can consider. This is because the Sixth Circuit in *Kreis* limited its discussion of partial terminations to those two factors because of the context of the case. *Id.* at 80. Hence, in a different context, such as the present case, a court may consider additional factors.

EFFECTS ON THE PLAN

A significant factor in determining the effects on the Plan from the exclusion of employees from participation in the Plan is the percentage of Plan participants who were involuntarily excluded from the Plan by Sea Ray in connection with a major corporate event. *Id.* This involves four factors.

MAJOR CORPORATE EVENT

The first factor concerns something termed a major corporate event.[11] No case has defined precisely what constitutes a major corporate event, primarily because it has never been

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[11]A major corporate event is not necessarily a prerequisite to finding that a partial termination has occurred. Layoffs due to nothing more than a downturn in business can trigger a partial termination. *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 160-162 (1984), but most courts have focused on a major corporate event.

raised as an issue. But guidance can be taken from the fact patterns of some of the cases that involve partial terminations. A partial list of obvious major corporate events includes closing down divisions of a corporation, *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), sale of assets, *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1141 (C.D. Ill. 1992), mergers, and corporate reorganizations, *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991). *See Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (Weil I).

The fundamental principle contained within the "major corporate event" factor is that the event is the identifiable cause of a large reduction in the work force, which thereby affects the plan. It is the drop in participation attributable to the cause which is considered in determining whether a partial termination has occurred. Hence, the substantial reduction in plan participants must be attributable to "involuntary exclusions" or "employee terminations" from the plan arising from the major corporate event. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 891 (10th Cir. 1988). Further, the requirement of a major corporate event focuses the court's inquiry on those terminations that are relevant for ERISA purposes and excludes those terminations that occur in the regular course of business. Reductions unrelated to the cause are not relevant because, presumably, they would have occurred in any event. *Halliburton*, 100 T.C. at 230-31, *citing Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), and *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991).

The Tax Court, in two cases, has ruled that the event of layoffs due to economic downturns can be sufficient for finding a partial termination. *See Tipton and Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 161 (1984); *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982). In *Halliburton*

*Co. v. Commissioner*, 100 T.C. 216 (1993), the court reiterated the ruling in *Tipton and Kalmbach, Inc.*, that a partial termination can result from layoffs due to an economic downturn. 83 T.C. at 230.

However, the court in *Halliburton* went on to rule that the downsizing caused by the 1986 collapse in the oil market was not the type of major corporate event usually found in partial termination cases. *Id.* at 231. The court noted that the economic downturn did not cause Halliburton to permanently restructure its operations. Rather, Halliburton engaged in a "temporary economizing measure, affecting all its operations, which was aimed at meeting a business emergency." *Id.* The court further noted that the economic cause was a "transitory economic phenomenon" and that Halliburton's response was likewise temporary. *Id.* This finding was supported by the fact that Halliburton was able to rehire many of the employees it laid off in the immediately succeeding years. *Id.* The court then concluded that "the circumstances surrounding the reduction in plan participation are less suggestive of a partial termination than would be the case had a permanent restructuring of the firm occurred, *e.g.*, the closure of a plant or division." *Id.*

The *Halliburton* court noted that one of the most important facts and circumstances bearing on the vertical partial termination issue is the size of the drop in plan participation resulting from the event causing such reduction. *Kreis*, 833 F.2d at 79. Employers who reduce their workforce due to adverse economic conditions must also distinguish their situations from that presented in *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984), by rehiring terminated participants in a relatively rapid manner. In that case, the workforce reduction was permanent, and participation levels did not recover in the years following the reduction. *Id.* at 162. Thus, a permanent downsizing or restructuring in response to

adverse business conditions suggests that a partial termination of a plan has taken place. *Id.*

At issue here is whether the terminations occurred as the result of a single corporate event. *See Halliburton*, 100 T.C. at 230; *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (Weil I). The court finds that at least one major corporate event occurred in this case. The business climate for the boating business and the imposition of the luxury tax provide sufficient proof of events to conclude that at least one requisite event has occurred.

MULTIPLE EVENTS?

Plaintiffs and Class II argue that there has been more than one event in this case. In the two-year period, plaintiffs have identified four periods in which there were major layoffs, one of which was particularly distinct because it was brought on at the large boat facilities in Florida due to the luxury tax that went into effect in 1991. According to the Committee, the layoffs in December 1990 and March-May 1991 at the Palm Coast and Merritt Island, Florida plants were due to the imposition of the luxury tax.

Class II defendants argue that there were two events: a two-year downturn in the small boat industry, and the downturn in the large boat business caused by the luxury tax. Class II notes that the total workforce at the Merritt Island and Palm Coast facilities that produced luxury yachts was reduced by a single employee during the 1989-1990 Plan year. However, following the imposition of the luxury tax, employment at these plants was reduced 44 percent in Plan year 1990-1991. Class II argues that since the 454 terminations resulting from these reductions represented 40 percent of the total Sea Ray terminations (1,143) for 1990-1991, the impact of the luxury tax on the high end product of Sea Ray represents an additional corporate event [Doc. 96].

Class II states that where terminations have occurred over a substantial period of time, the courts have been willing to break the terminations down into separate groups for the purpose of calculating the appropriate percentages. *See Halliburton*, 100 T.C. at 230, *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (*Weil I*), Class II notes that in *Tipton & Kalmbach, Inc.*, 83 T.C. at 155, it was found that a long-term corporate downturn associated with normal industry volatility is not considered to be a single event and may be measured in separate years. *See also Kreis*, 833 F.2d at 83. According to Class II, the IRS has also accepted the concept of segregating multiple year terminations into separate percentage breakdowns for analysis. *See* IRS, Plan Termination Handbook § 252(5)(c) [Doc. 85]. Class II contends that if the position of Class I is taken to its logical conclusion, every employer would have to take a wait and see attitude toward the effects of any reduction of the workforce regardless of time frame. If the whole concept of ERISA plans is to encourage the creation and funding of retirement benefits for all employees, Class II argues that this type of burden is inconsistent with promoting the implementation of such retirement plans [Doc. 96].

Additionally, plaintiffs suggest that the court possibly should either consider the percentage reduction in each Plan year separately, or should adjust the percentage guidelines to take into account the multi-year period [Doc. 93].[12] The Committee contends that considering normal turnover rates in the industry, it would make no sense to apply the percentage guidelines--particularly the 20 percent threshold--to multi-year periods. Plaintiffs argue that in normal economic conditions, many employers will experience 20 percent or more turnover

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[12]Plaintiffs indicate that if their motion for summary judgment is denied, they would request the opportunity to make an appropriate deduction for normal turnover at a later time [Doc. 83].

in two years [Doc. 93].[13] Relying on the IRS guidelines, plaintiffs suggest a turnover rate based on the supposed cyclical nature of the marine industry generally be considered while determining whether the appropriate percentages in this case:

> The facts and circumstances must be considered in each case and may include the extent to which terminated employees are replaced, and the normal turnover rate is a base period. The base period ordinarily should be a set of consecutive plan years (at least two) from which the normal turnover rate can be determined, and should reflect a period of normal business operations rather than one of unusual growth or reduction. Generally, the plan years selected should be those immediately preceding the period in question.

IRS, Plan Termination Handbook § 252(7).

Class I argues that there has been one event. Class I relies on the case of *In re Gulf Pension Litigation*:

> Defendants argue that in determining whether a vertical or partial termination occurred the court should consider only the number of employees excluded within a single plan year. The court does not find this position to be supported by logic or

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[13]Plaintiffs note that excluding layoffs, the median turnover rate for all companies during the four quarters beginning July 1989, for example, was 12.2 percent. Bureau of National Affairs, Quarterly Reports on Job Absence and Turnover, 3rd Quarter 1989-2nd Quarter 1990. *See also,* Vaughn, *Employee Turnover Study*, The Pension Forum (Aug. 1992) (during the two-year period preceding the Sea Ray downturn, average annual turnover among employees with more than one year of service was 13 percent).

> required by authority. Most reported vertical partial termination rulings and decisions did not involve massive corporate restructuring of the scale implemented by *Gulf* and *Chevron*. The facts in those decisions were therefore generally limited to a period of less than a year. There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar year has no intrinsic relevance in making this evaluation. The IRS guidance found in § 252(7) of the Plan Termination Handbook instructs that "[t]he turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period." Both the IRS, in its Technical Advice Memorandum concerning the Employee's Retirement Plan of A & P Company, and the Second Circuit in *Weil I*, 750 F.2d at 12, have stated that a series of employer-initiated terminations related to the same event may be considered in determining whether a partial termination has occurred even if those terminations occur over a multi-year period. This court likewise concludes that, assuming plaintiffs can prove it, a vertical partial termination rate will be higher than when the work force is contracting. It is therefore not reasonable to assume that the 1978-1981 turnover rate would have continued in the 1984-1986 era.

*In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1166-67 (S.D. Tex. 1991), *aff'd sub nom., Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, _ U.S. _, 115 S. Ct. 1699, 131 (1995). The corporate event considered by the *In re Gulf Pension Litigation* court spanned two and one-half years.

In regard to possibly adjusting the percentages to account for normal turnover, Class I argues that "Sea Ray had no normal year" and therefore cannot deduct normal turnover. From gradual growth to accelerated growth at the rate of $100 million a year in the eighties, Class I notes that Sea Ray continued to climb and expand until the sudden unprecedented drop in 1989. Before the drop off, Sea Ray's experience was one of continuous and dramatic growth. Class I further notes that the two years preceding the decline, Plan years 1987-88 and 1988-89, were the years of Sea Ray's greatest growth. Class I points out that the IRS has opined that the normal turnover rate should reflect a period of normal operations, rather than one of unusual growth or reduction, and that the period selected for determining the rate should be the two years preceding the decline. According to Class I, plaintiffs cannot possibly arrive at such a calculation.

As noted by Class I, in the complaint, no distinction is made with respect to various layoffs. The downturn is described as continuous. In announcing layoffs, reference was always made to declining market conditions generally. Even the announcements in 1991 either mixed the luxury tax together with conditions in the industry generally, or did not mention the luxury tax at all. Mr. Barrington, Sea Ray's President and CEO, referred to the slide as continuous [Barr. Dep. at 136-139].

The cause of the crisis at Sea Ray was an economic downturn in the boating industry, rapid, severe and reflected by substantial reductions in the workforce and the closing of three manufacturing facilities. The imposition of the luxury tax resulted in an additional drop of sales with significant terminations at the Merritt Island and Palm Coast plants and the closure of the Oxford plant. It appears to the court that two events occurred in this case. The circumstances surrounding the large boat layoffs were distinctly different than those for the

small boats. Mr. Barrington indicated that the decline in sales was across all product lines except the yachts, which continued to sell relatively well until 1990, when the luxury tax went into effect [Barr. Dep. at 39, 86-87]. It does not appear that the additional large wave of layoffs would have occurred but for the luxury tax.

A long-term corporate downturn associated with normal industry volatility is not considered to be a single event and may be measured in separate years. *Tipton & Kalmbach, Inc.*, 83 T.C. at 155; *Kreis*, 833 F.2d at 83. The IRS has accepted the concept of segregating multiple year termination into separate percentage breakdowns for analysis. *See* IRS, Plan Termination Handbook § 252(5)(c). The court is unpersuaded by the arguments of Class I relating to the *In re Gulf Pension Litigation* case, 764 F. Supp. 1149 (S.D. Tex. 1991), as that case is too factually dissimilar to the matter at hand.

The court finds that two separate events occurred. As a result, it is the opinion of the undersigned that the Plan should be analyzed in separate years for the purpose of calculating the appropriate percentages.

INVOLUNTARY TERMINATIONS

Every analysis of the facts and circumstances which might show a partial termination of a plan includes consideration of the number of plan participants whose employment has been terminated. It must be decided which classes of employees will be included in the calculation. The goal of the calculation is to identify those employees who were involuntarily excluded from participating in the plan due to employer-initiated terminations in connection with a major corporate event. *In re Gulf Pension Litigation*, 764 F. Supp. at 1160; *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1302-03. In every case, it is clear that not every employee separated from service should be included in the affected employee class. Certain

employees would have terminated employment regardless of the economic circumstances. Others who left may not have been within the class of plan participants which Congress intended to protect under the partial termination rules.

The parties agree that certain classes of separated employees should not be counted in the partial termination percentage. Such classes include deaths, normal retirements, terminations for cause, and terminations due to disabilities. IRS, Plan Termination Handbook § 252(7). The discontinuance of such employees' participation in a plan is deemed not to be attributable to the employer's reductions in force, and so such employees are deemed not to have been affected by such action. *See In re Gulf Pension Litigation*, 764 F. Supp. at 1168; *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1302-1303.

There is also general agreement that transferred employees are not to be included among those who were involuntarily excluded from participating in a plan. *See Halliburton*, 100 T.C. at 245; *In re Gulf Pension Litigation*, 764 F. Supp. at 1165-66; *Morales*, 718 F. Supp. at 1302-03. Further, since the purpose of the calculation is to determine the percentage of those involuntarily excluded from participating in a plan, employees who voluntarily leave the company are also not to be included in the calculation. *Halliburton*, 100 T.C. at 239-43; *Morales*, 718 F. Supp. at 1302 ("a voluntary decision to leave employment does not trigger a partial termination"); *Anderson v. Emergency Medicine Assoc.*, 860 F.2d 987, 990 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 891 (10th Cir. 1988); *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987); *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 11-13 (2nd Cir. 1984) (*Weil I*); *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1166 (S.D. Tex. 1991); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989).

The underlying data for the initial list of Class I employees was collected in 1993 by an assistant to Ms. Jarnigan. The list was an attempt to identify all of the employees who left the Sea Ray Plan during the two Plan years at issue, with the reasons for termination entered by the assistant as voluntary, involuntary, layoff, and other (death). The list was then sent to the plants, where additional information was sought, such as whether the employee had been laid off, rehired, or refused recall. After the additional information, if any, was received from the plants and noted, the list was sent back to headquarters, where the final data base for plaintiffs' version of Class I was prepared [Jarn. Dep. at 35, 39-40, 42]. With one exception, Sea Ray put a terminated employee on the list if the employee's final termination was the result of being laid off: once the announcement had been made that a plant would close, anyone who left employment at that plant after the announcement of the plant closing was considered a layoff [Jarn. Dep. at 42].

Thus, plaintiffs excluded from Class I any Plan participants who voluntarily left employment with Sea Ray with no further explanation on their COS forms and those who left Sea Ray for work with another employer, even if they left for fear of being laid off by Sea Ray [Jarn. Dep. at 84-85]. Plaintiffs further excluded participants who volunteered to take a termination when a reduction in force was announced, to spare the layoff of other employees. Plaintiffs classified those employees as voluntary layoffs [Jarn. Dep. at 65]. Plaintiffs also excluded participants not responding to a recall, considering them "voluntary terminations." Finally, plaintiffs excluded from Class I any terminated participants who were fully vested.

The initial list identified 963 Plan participants believed to qualify for Class I. Approximately 1200 participants who left

during the relevant time period were excluded from the Class I list.

In regard to determining whether the former employees not included in Class I were properly excluded, the Class I defendants contend that the parties agreed that the COS forms from six plants would be reviewed, the reasons for termination categorized, numbers assigned to each category, and then those would be extended by percentage to all plants and divisions [Doc. 91]. The six plants were Fort Mill, Cherokee Cove, Tellico, Knoxville, Riverview, and Oxford. While COS forms could not be found for all Plan terminees, through the process, Class I claimed to have developed numbers for terminees who were laid off, terminees who left voluntarily with the stated reason of accepting or seeking employment elsewhere, and those who left voluntarily with no reason stated on the form.[14]

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[14]Class II notes that during the discovery phase, counsel for Class II objected to the use of these COS forms for any purpose other than sampling to determine if any substantial deviation existed between the ERISA census materials and the COS forms for certain closed plants. A company-wide review of the COS forms was not conducted. Neither plaintiffs nor Class II indicated that they agreed to allow the COS forms to be considered as anything more than research documents for statistical sampling purposes.

Class II contends that if the COS forms cannot be relied upon, then the presumption must be that the census compilations maintained by Sea Ray for ERISA reporting purposes are the accurate source data. The compilations do not contain an in-depth determination of the employee's motivations in voluntarily terminating employment. Class II argues that there is no Internal Revenue Code, Treasury Regulation, or Department of Labor Regulation that requires Sea Ray to maintain such information. Additionally, Class II states that because many employees terminate employment by simply not coming to work, that absent authority requiring a large employer to maintain such in-depth records, it would be unfair for this court to include voluntarily terminated participants in Class I.

FULLY VESTED V. NON-VESTED

There appears to be a split of authority on whether a distinction should be made between vested and non-vested employees for the purpose of calculating the significant percentage of drop in plan participation. The Second Circuit takes the approach that all terminated plan participants must be considered in the partial termination inquiry. *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d at 110 (*Weil III*). This position is based on the belief that Congress "regarded a partial termination to be a sudden and dramatic change in the plan as a whole" and that the language used in the Treasury Regulations refers to the exclusion of employees who were covered by the plan. *Id.* Further, the *Weil III* court concluded that the regulations do not make a distinction between vested and non-vested employees. *Id.* Hence, that court determined that the purpose of the significant percentage test is to gauge the effect of the terminations on the plan as a whole. This position was also adopted by the court in *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989).

The court in *In re Gulf Pension Litigation* takes the opposite position, only including non-vested employees in its calculation. 764 F. Supp. 1149, 1165 (E.D. Tex. 1994). This position is based on the belief that the partial termination rule exists to "prevent forfeiture of pension benefits that have not yet vested and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income taxes." *Id.* Hence, the court felt that including fully vested employees does not further these goals of ERISA. *Id.*

The number of Plan participants terminated who were fully vested included 123 during the 1989-1990 Plan year and 273 during the 1990-1991 Plan year, for a total of 396.

The IRS' plan termination provision explains the term "discharge" in the context of "employer-initiated terminations:

> (7) The turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period. Employer-initiated terminations are generally all terminations other than those attributable to death, disability retirements and retirement at normal retirement age. In certain situations, the employer may be able to prove that other terminations were also not employer-initiated. The Service takes the position that, in general, fully vested terminees are included in determining whether there has been a partial termination. This position was upheld in *Weil v. Terson Co. Retirement Plan Committee*, 82 Civ. 8468 (S.D. N.Y., June 15, 1988). Terminations are counted even if caused by an event outside the employer's control, such as terminations due to depressed economic conditions. However, substantial diminution in employee participation was not deemed employer-initiated and thus did not result in a partial termination, where strikers failed to return to work after being offered reemployment. *B.C.M.* 39344 (October 16, 1984).

IRS, Plan Termination Handbook § 252(7). Thus, the IRS takes the view that fully vested terminees should be counted in the percentage of plan participation drop. *Id.*

In *Weil III*, the court noted as follows:

> Having concluded that the congressional purpose behind the partial termination statute is unclear and that the statute is silent regarding the measurement of

> a partial termination, we next consider whether the IRS' position is based on a permissible construction of § 411(d)(3). In our view, the IRS' interpretation of § 411(d)(3)--that a partial termination occurs when there is a significant contraction of the plan, and therefore, all terminated plan participants must be considered in a partial termination inquiry--is a reasonable construction in light of the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizeable reduction in benefits under the plan"). Those ex- amples suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole. Moreover, the language used in the Treasury regulations, which refers to the exclusion of employees who have been covered by a plan, additionally supports the IRS' position.
>
> We also find significance in the fact that no distinction was made between vested and non-vested plan participants in these sources. We therefore apply the ratio utilized by the IRS and, as the district court found, conclude that the plan was partially terminated in 1981 when 33.4 percent of the plan participants were discharged.

*Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 110 (2nd Cir. 1991) (*Weil III*).

The Committee has agreed to include fully vested terminees in the percentage calculation [*See* Doc. 83]. Therefore, for purposes of developing the significant percentage of drop in Plan participation in this case, the fully vested Plan terminees will be counted.

CONSTRUCTIVE DISCHARGE

The decisions recognize that Plan terminees should be counted in the significant percentage if they have been constructively discharged. Class I has raised as an issue in this case whether some employees who resigned their positions during the relevant time period should be considered as constructively discharged and therefore regarded as involuntarily terminated.

In *Kreis v. Charles O. Townley, M.D., & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), the Sixth Circuit ruled that the doctrine of constructive discharge, created in the context of civil rights law, "provides an appropriate basis for ascertaining whether participants were involuntarily excluded from the Plans . . . ." 833 F.2d at 81. The court then went on to review the law of constructive discharge in the Sixth Circuit:

> [T]he constructive discharge issue depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee . . . . [A] finding of constructive discharge [also] requires the determination that: "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). *Accord Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 49 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984). "The employee's perception of his situation is judged objectively. 'An employee may not be unreasonably sensitive to his working environment. A constructive discharge arises only when a reasonable person would find conditions intolerable.'" *Henry v. Lennox Indus.*, 768 F.2d 746, 752 n.3 (6th Cir. 1985) (*quoting Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)).

*Kreis*, 833 F.2d at 82. The Sixth Circuit has elsewhere ruled that the employer is held to intend the foreseeable consequences of his conduct. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). Also, in the civil rights context, the Sixth Circuit ruled that "[p]roof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors. *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984) (*citing Clark v. Marsh*, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981). Having defined "constructive discharge," the court in *Kreis* then considered whether there had been constructive discharges of the two employees to whom the doctrine could have applied in that case--two staff assistants employed in the doctors' offices. The court noted earlier in its opinion that whether there had been a constructive discharge is a question of fact. 833 F.2d at 81. With respect to a secretary who quit to work elsewhere, the district court had found that she had been constructively discharged because, needing a full-time job, "she justifiably and reasonably feared" she would be working only part-time when three of the five doctors on the staff were fired. 833 F.2d at 82. With respect to a transcriptionist, the district court found she left for other employment because of a similar fear of having her hours cut. *Id.* Although the Sixth Circuit found it significant that the voluntary terminations occurred because of employee concerns for long-term employment, the appellate court concluded that the facts in the record did not support the finding of constructive discharge on either case. Class II argues that the Sixth Circuit apparently placed the burden of proving the constructive discharge on the party asserting such issue. 833 F.2d at 82-83.

In *Halliburton*, almost all the employees counted as voluntarily resigning filled out a form giving their reasons for leaving. None stated he or she was leaving because of an anticipated discharge or layoff, and none were counted in

deciding whether a partial termination had occurred. *Halliburton*, 100 T.C. at 242. The court noted that

> [S]ome employees might leave their jobs of their own accord, even when economic situations are bad, because of dissatisfaction with their situations or for personal reasons. The partial termination rule was not meant to protect such persons--they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do. Moreover, vesting their benefits would not necessarily deter abuse by employers.

*Halliburton*, 100 T.C. at 241. The *Halliburton* court concluded that employees can be found to be constructively discharged if they resign due to intolerable working conditions created by the employer. *Id.* The court went on to hold that voluntary, non-employer-initiated terminations are not to be considered in deciding whether a partial termination has occurred.

In *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1140-41 (C.D. Ill. 1992), that court ruled that employees are constructively discharged if they resign after it is clear that there is no prospect of continuing to work for the employer, as in the case when a company sells its assets. *See also, Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1303 (no prospect of working when division closes down). The court determined that constructive discharge occurs wherever an employee reasonably believes his employment may be at an end. *Collignon*, 796 F. Supp. at 1141-42; *Morales*, 718 F. Supp. at 1303.

Plaintiffs contend that except when it is shown that an employee "resigned due to intolerable working conditions: or left "after it is clear that there is no prospect of continuing to work for the employer" [*Halliburton*, 100 T.C. at 240],

employees who leave voluntarily cannot be counted for partial termination purposes. Class II claims that the employer must have overtly and purposely created a hostile and unbearable work environment or else the employee must have actual notice that his employment is about to be terminated such as an actual closure notice [Doc. 85].

Class I argues that the evidence shows that when the layoffs were announced on or about July 27, 1989, the employees at Cherokee Cove were told or knew beyond a reasonable doubt that the plant was to be closed, and that those who left voluntarily did so in anticipation of layoff. They further note that the conditions at the Tellico plant after the July 1989 layoff were such that employees were well advised or encouraged to look for work elsewhere. Class I also argues that employees at the Phoenix plant left in anticipation of layoff, and even feared the plant would close [Class I filing of June 5, 1996].[15]

There is insufficient evidence to demonstrate that the employees were constructively discharged. Although it is probable that the economic conditions at Sea Ray were a factor in some, if not most, of the cases of employees leaving early, such consideration does not make the choice to leave involuntary. Just because economic conditions are bad enough to require layoffs does not mean that the conditions have risen to the level of "intolerable" or that there was clearly no prospect of continuing to work for the employer. As noted in *Halliburton*, "some employees might leave their jobs of their own accord, even when economic conditions are bad, because

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[15]Class I submitted the affidavits of several workers: Dottye Odle is an example of a former employee who claims to have resigned before being laid off because of a need for job security. Robert C. West states he resigned once being told Cherokee Cove plant would close and upon finding another job.

of dissatisfaction with their situations or for personal reasons. 100 T.C. at 241. Simple concern over future long-term employment is insufficient to sustain a claim of constructive discharge. *Kreis*, 833 F.2d at 82-83.

SIGNIFICANT PERCENTAGE

The third factor, and probably the most important, is that the major corporate event must result in a "significant percentage"[16] of plan participants being involuntarily excluded from participation in the plan. *Kreis*, 833 F.2d at 79. The significant percentage test has generally been accepted by courts ruling on the partial termination issue. *See, e.g., Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d at 151; *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. at 159-160; *In re Gulf Pension Litigation*, 764 F. Supp. at 1163-1164; *Kreis*, 833 F.2d at 79. As one court recognized, "there is no magical figure at which a partial termination occurs." *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1052 (2nd Cir. 1990) (Weil II) (citations omitted). On the other hand, the Sixth Circuit has recognized that the "percentage may be so high or so low as to be determinative standing alone." *Kreis*, 833 F.2d at 80.

As noted previously, generally, a percentage above 50 percent will be determinative of the occurrence of a partial

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[16]The Third Circuit has rejected the "significant percentage test" relying instead on there being a relationship between the number of employees terminated and the appearance of the plan as a mechanism for deferring income, not paying benefits. *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 151 (3rd Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 101, 109 S. Ct. 948 (1989). *See also Gluck v. Unisys Corp.*, 960 F.2d 1168, 1183 (3rd Cir. 1992).

termination, *Halliburton*, 100 T.C. at 236,[17] whereas figures below 20 percent will only be significant if there is evidence of egregious abuse.[18] *In re Gulf Pension Litigation*, 764 F. Supp. at 1164. Percentages between 20 percent and 50 percent will be significant only if combined with other factors. *Id.*[19]

The Sixth Circuit in *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), engaged in a substantial review of the case law then in effect for the purpose of determining what percentages had been considered to be significant to the point of solely sustaining a finding of partial termination. The court noted at that time that the lowest percentage sufficient to find a partial termination was the 34 percent of *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984).

The cases set forth the formula to be used in calculating the percentage of involuntary terminations. The denominator of the fraction is composed of the total number of Plan participants at the beginning of the relevant period, plus all those participants added to the Plan during that time period.

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[17]*See Tipton v. Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984) (51% in year 1972); *Peter M. Boruta, M.D., P.C. v. Commissioner*, T.C. Memo. 1988-172 (66.67%).

[18]For cases where percentages below 20% have been insufficient for finding partial termination, *see Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987) (13.6% and 15%); *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985) (12.4%); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989) (15.3%); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113 (D. Kan. 1984) (2.5%); *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982) (3.7%).

[19]*See Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984) (34%); *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991) (45.2%); *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (1991) (Weil III) (33.4%).

*Tipton & Kalmbach, Inc.* at 156. The numerator consists of those Plan participants classified as involuntarily terminated during that time period due to the major corporate event minus the excludable employees. IRS, Plan Termination Handbook § 252(7).

The fraction is as follows:

$$\frac{\text{Total Reduction Minus Excludable Employees}}{\text{Total Number of Participants}}$$

In this case, of 4,135 total Plan participants, 2,216 employees were terminated during the 1989-1991 period.[20] Class I states this figure should be adjusted to 2,167 [Doc. 91]. Of this number, 963 were believed by plaintiffs to compose Class I.[21] Of the remaining 1,253 terminated employees, 648 have been identified by plaintiffs as employees who voluntarily terminated their employment with Sea Ray or employees who died, retired, or became disabled [Doc. 91].[22] Plaintiffs claim

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[20]Class II adopts the statistics of plaintiffs in their initial memorandum.

[21]Plaintiffs note that they do not concede that those 963 individuals all belong in Class I. Plaintiffs state that for purposes of class notification, Sea Ray provided Class I counsel with a list of the names and addresses of individuals the company believed to be in Class I, but it never "conceded" or "stipulated" that those individuals are all in Class I or where all involuntarily terminated, any more than Class I counsel has conceded that no other individuals belong in Class I. Plaintiffs indicate that throughout this litigation it has been clear that if the court concludes that a partial termination took place, an individual-by-individual factual review would be conducted by the Plan to determine who is and who is not entitled to vesting.

[22]Class I states that the number of remaining terminees was assumed at first to be 1,253--those other than the 963 dropped from the Plan, plus 352 added to the Plan during the two years. Class I states that the number added was actually 307, making the number of remaining terminees 1,204.

that a total of 648 participants should be excluded from the calculations, including 373 who left the Plan in 1989-90, and 275 who left in 1990-1991 [Doc. 83]. Plaintiffs note that their review shows that 211 participants who were terminated from Plan participation because they died, retired, became disabled, were terminated for cause, or voluntarily terminated their employment for stated reasons unrelated to the corporate event(s) should be excluded, including 102 who left in 1989-90 and 109 who left in 1990-91. It is clear that those employees who died, retired, or became disabled were not involuntarily terminated by the employer, Sea Ray.

Class I argues that 67 terminees on the "excludable" list have been conceded by plaintiffs as being in Class I and should be eliminated from the list. The Committee notes that it does not "concede" that any employees listed all belong in Class I; rather, Sea Ray provided a list of names of individuals "believed" to be in Class I. Class I contends that 85 terminees are fully vested and should be eliminated from the list. Plaintiffs argue that in light of *Weil III*, since fully vested participants who are employer-initiated terminees are to be counted in the partial termination calculation, it is necessary to exclude any fully vested individ- uals if their termination was not employer-initiated (*e.g.*, if they left voluntarily). Class I also states that ten of the medical terminations should be eliminated from the list, because the light duty jobs were eliminated due to layoffs. Plaintiffs argue, however, that the quoted language regarding light duty work appears on only one of the nine COS forms, and there is no indication that the terminees were able to do any light duty jobs that had been "eliminated due to plant layoffs." Further, plaintiffs contend that there is no reason not to apply the rule that employees who leave as a result of disability are not counted for partial termination purposes to the ten Tellico employees [Doc. 97]. Class I further indicates that two employees apparently terminated for long-term disabilities should be on the excluded list.

Further, one employee with a notation about worker's compensation should be on the list. However, Class I goes on to state that all participants marked as having terminated voluntarily should be included in Class I for one of three reasons: (1) there is no explanation, credible or otherwise, how some are connected to the major corporate event and some are not; (b) many left in anticipation of layoff; and (c) numerous "voluntary" entries appear for terminees for whom no COS forms have been made available. Therefore, Class I argues that only 35 terminations due to death (2), termination for cause (30), or medical reasons should be excluded from the employer-initiated terminations used in the calculations for partial termination [Doc. 91].

## THE CALCULATIONS

The Committee's calculations are as follows:

1989-90: $\frac{\text{Total Reduction - Excludable Employees}}{\text{Total Number of Participants}} = \frac{(1{,}033 - 373)}{4{,}093} = 16.1\%$

1990-91: " $= \frac{(1{,}183 - 275)}{3{,}151} = 28.8\%$

1989-91: " $= \frac{(2{,}216 - 648)}{4{,}184} = 37.5\%$

This calculation includes all terminees, fully-vested and partially vested. Excluded are those participants who died, retired, became disabled, were terminated for cause, or voluntarily left their employment, except those who left Fort Mill or Oxford after the plant closing announcements.

Class II's calculations adopt the adjustments noted by plaintiffs, but contain more up-to-date figures due to the changes made by Class I:

1989-90: Total Reduction - Excludable Employees / Total Number of Participants = (1,024 - 373) / 4,084 = 15.9%

1990-91: " = (1,143 - 275) / 3,111 = 27.9%

1989-91: " = (2,167 - 648) / 4,139 = 36.7%

On the same assumptions, Class I's calculations for the two-year period are as follows:

1989-91: Terminees in Class I + Fully Vested / Participants (6/30/89) + Additional Participants over Period = ( 963 + 396) / 4,135 = 32.9%

OR

Total Reduction - Excludable Employees / Total Number of Participants = (2,167 - 648) / 4,135 = 36.7%

The court essentially adopts the calculations of plaintiffs, considering the modifications noted by Class II. It is determined that there is insufficient evidence that Sea Ray failed to include any terminees who left after Sea Ray announced that it was closing the plant at which they worked. Also, as noted previously, Class I's assertions regarding constructive discharge ignore the fact that employees leave their jobs for a variety of reasons every day. Further, the COS forms cannot support a reliable determination of fact: the forms were not implemented company-wide under a standardized format; the manner and methodology employed in completing the COS forms was left to the discretion of the indi-

vidual plant managers; the forms were not transmitted to company headquarters and did not constitute the source documents for ERISA reporting purposes; the forms do not reliably offer information as to an employee's psychological motivation for leaving employment; and the parties did not review all of the forms for every plant.

The undersigned finds it significant that there is no Internal Revenue Code, Treasury Regulation, or Department of Labor Regulation that requires Sea Ray to maintain such records. Without substantive proof that the voluntary terminations were the result of a constructive discharge as conceptualized by the Sixth Circuit, this court must exclude the voluntary terminees from any list constituting the affected members of Class I.

FINANCIAL EFFECTS OF THE PLAN

The Sixth Circuit also considered relevant the extent to which a plan is affected financially by the discharges. *Kreis*, 833 F.2d at 80. The plan can be adversely affected by the terminations in two ways. First, the plan can be impaired financially by a discharge of a significant percentage of participating employees. *Id.* Second, the plan can be financially impaired by discharging those employees who had assured its financial success. *Id.* However, "by itself, the percentage of employees discharged may not always state accurately the discharges' impact on the plan. *Id.*

In this case, none of the parties suggest that the layoffs during the relevant period impaired the Plan financially. Therefore, it is not an issue in this case.

MOTIVES OF EMPLOYER

The second part of the *Kreis* test involves looking at the motives of the employer in discharging the employees. The Sixth Circuit ruled that the inquiry into the employer's motives focuses on whether the employer "excluded the plan

participants in a predatory effort to profit from subsequent forfeitures and/or diminished contribution requirements." The Sixth Circuit there identified two ways in which the employer can abuse the plan. First, the employer can exclude participants in the plan to effect a reversion of the contributions back to the employer. By doing so, the employer would reap a windfall in new income. The Sixth Circuit also noted that for bad faith or abuse to exist, it is not required that the employer be the beneficiary of the windfall. The size of the accrued but non-vested benefits that will fall to the beneficiaries of the employer's decision can be evidence, though not dispositive, of bad faith. Second, by excluding a significant percentage of plan participants, the employer can decrease its contribution duty to the plan.

In this case, the Class I defendants do not argue that Sea Ray was motivated by improper motives in terminating the employees. Since there is no suggestion to the contrary, it is not an issue in this case. No evidence of abuse exists in the instant case that would justify lowering the level at which the percentage drop in Plan participation would be deemed significant.

The court is left with the question "Was the Committee's determination reasonable?" In determining whether or not a partial termination occurred, it appears that the Committee took the following facts into consideration. First, the Committee noted that the layoffs were dictated by business conditions in a cyclical business. Second, the Committee determined that the forfeitures would not decrease the company's required contributions or create or increase the possibility of reversion to the company. Third, the Committee concluded that the terminations were not motivated by a desire to discriminate in favor of highly compensated employees. In short, the Committee found that the only fact supporting the finding of a partial

termination was the layoffs. Defendant Committee member, Mr. Barrington, noted as follows in his deposition:

> A. [W]e took a look at, or at least we were explained to by counsel, what the intent of this whole issue of partial termination was and that we concluded that none of the things that happened to our company or our industry related to any of the explanations or issues that were explained to us. There was no premeditated intent to lay off employees or abusive situation or anything like that. It was simply an economic market-based reduction of our current--our employment at the time.

[Barr. Dep. at 33].

* * * *

> A. I believe that, as explained again by counsel to us, that there was an intent in the law, and the intent being that, to prevent abusive type of situations occurring where employees were terminated on some kind of premeditated basis in order that their unvested benefits would accrue to whomever, and there were some regulations, there were some laws, that were put into place to prevent that sort of thing from happening.
>
> And I believe, in our conclusion, after looking at the facts and in fact, it quite frankly was never an issue in our mind whatsoever, which might be one of the reasons that a lot of these questions I just can't answer because, obviously, it wasn't something that we studied very carefully.

But in any case, I think the analysis of the committee was--the conclusion of the committee was that, in fact, we--there was absolutely no indication whatsoever, no evidence whatsoever, for any type of an abusive situation or a plan or a major event like an acquisition or anything like that that would cause these layoffs, or cause us to be abusive in any manner whatsoever.

* * * *

[T]hey presented us with some of the facts regarding this twenty percent rule and that sort of thing. That was kind of a rule of thumb, Again, a very gray area. And that's about the extent of it, I think.

Q. Okay. Did you look at it from the basis of a two year period--a two plan year period?

A. I think that's the period of time we've been concentrating on, yes.

Q. Okay. All right. So you didn't look at it from the standpoint of one plan year and then another plan year, but rather from the total two year period?

A. The total two year period.

[Barr. Dep. at 52-54.]

* * * *

Q. All right. If you were aware that it was over twenty percent, was that a significant fact to you in making your determination?

A. I don't believe it was, because I still think, as explained to us by counsel, the intent of this whole area is to correct abusive situations. In no

> way was the situation that we were faced with during that period of time anyway influenced by whether or not a person was vested or not vested.

[Barr. Dep. at 55-56.]

Class I contends that the Committee erred in not considering whether constructive discharges occurred. The minutes of the meetings do not reflect that they were. Apparently, Sea Ray officials had discussed internally whether constructive discharges should be considered and decided against it [Jarn. Dep.]. During her deposition, Ms. Jarnigan testified that she discussed with Mr. Cronkhite, Sea Ray's general counsel, the issue of how to classify employees who left voluntarily after the big layoff in July 1989. She noted that it was recognized that those employees might be leaving in anticipation of layoff and might properly be classified as layoffs rather than voluntary terminees, but that the decision was made to classify them as voluntary terminees because an employee's decision to leave before being laid off was considered subjective. The company did not want to speculate on why those employees left [Jarn. Dep. at 86-88].

Class I also argues that the Committee's decision was clearly erroneous because it had failed to consider whether the Plan had been terminated due to the percentage by which the Plan had contracted. Class I states that the issue was not even discussed as the minutes reflect that the discussion focused on lack of abuse [Doc. 91]. Class I further contends that the Committee erred in determining that the Plan had not been partially terminated because of the finding of lack of abuse. According to Class I, because the Committee focused on the issue of abuse, there is no evidence supporting the conclusion.

Class I insists that "a decision resting solely on a ground that does not justify the result reached is arbitrary and capricious." *MCI Telecommunications Corp. v. FCC*, 10 F.3d

842, 846 (D.C. Cir. 1993). Class I argues that the Committee's decision that there had been no partial termination was based solely on the lack of abuse. They contend that the findings of lack of abuse could not justify the result reached because, when a high percentage of Plan participants have been terminated, abuse need not be an issue and lack of abuse cannot be the sole reason for not finding a partial termination. Class I claims that the Committee's decision rested solely on a ground that did not justify the result.

It is unclear if the percentage considerations were sufficiently examined at the meetings, yet Mr. Barrington's testimony indicates that the percentage information was explained to the Committee [*See also* committee Minutes]. Ms. Jarnigan's statements reveal that constructive discharges were considered at the company level, and a decision made as to that issue was consistent with the determination of the undersigned that examining evidence of constructive discharges is not required.

This court finds that the Committee's determination was not arbitrary or capricious. It was a reasonable interpretation of the Plan and of the cases and regulations concerning partial termination. The percentage rates for the Plan year 1990-1991 and for the two-year period as a whole are above the 20 percent level, but there is no evidence that this workforce reduction was the result of anything more than an economic downswing. Unlike the cases involving permanent shutdowns of facilities, Sea Ray continued to employ a large amount of workers and has recalled many workers who were laid off during the relevant period. The sliding percentage scale should be applied. *See Halliburton*, 100 T.C. at 237, *citing Kreis*, 833 F.2d at 79-80. Since there is no evidence of abuse, I find that the percentage of participants terminated was insufficient for a finding of a partial termination. *See Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984). Also, as noted in the

IRS Plan Termination Handbook, a "reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; . . . ." § 252(10). It is RECOMMENDED that the Class I defendants' motion for summary judgment be DENIED, and that the cross-motions for summary judgment of plaintiffs and Class II defendants be GRANTED.[23]

Respectfully submitted,

/S/
Thomas W. Phillips
UNITED STATES MAGISTRATE JUDGE

---

[23]Any objections to this report and recommendation must be filed with the clerk of the court within ten (10) days of receipt of this notice. Such objections must conform to the requirements of Rule 72(b), Fed. R. Civ. P. Failure to file objections within the specified time waives the right to appeal the district court's order. See *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

APR 13 9 12 A.M. '93

U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY ___ DEP. CLERK

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,

Plaintiffs,

v.

DANIEL ROBINSON, ET AL. (CLASS 1)

Defendants,

No. 3:92-cv-587

**MEMORANDUM AND ORDER**

In a Report and Recommendation dated February 2, 1993 [Doc. No. 52], and amended February 18, 1993 [Doc. No. 56], Magistrate Judge Thomas W. Phillips recommended that plaintiffs' motion for class certification [Doc. No. 42] be granted with certain limitations. He also recommended that the administrative expenses, attorney's fees and fees of experts incurred in connection with this litigation be paid, and that all class members be given notice pursuant to Rule 23(c)(2), Fed.R.Civ.P. The court has reviewed the Report and Recommendation and defendants' timely-filed objection [Doc. No. 54] thereto. The court being in agreement with the Report and Recommendation, it is hereby ACCEPTED IN WHOLE. 28 U.S.C. §636(b)(1).

This is a declaratory judgment action wherein plaintiffs seek a determination that there has not been a partial termination of an employee benefit plan created pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Certain provisions of ERISA, as well as regulations promulgated pursuant to the Internal Revenue Code and the terms of the benefit plan at issue, define the meaning of a partial termination. The benefits plan is a combination stock bonus and profit sharing arrangement ("Plan") in which all contributions are made by the participants' employer, Ray Industries, Inc. ("Sea Ray"). Sea Ray's employees make no direct contributions to the Plan. Employees become participants in the Plan upon completion of one full year of service. The terms of the Plan also provide that participants forfeit any portion of their accounts not vested when their service terminates. Forfeitures of Plan assets occur where participants are terminated prior to the vesting of their accounts. These forfeitures are then allocated to the remaining Plan participants.

Plaintiffs' motion seeks certification of two classes of defendants. According to plaintiffs, the first class ("Class I") should consist of all former Sea Ray employees who were participants in the Plan *and* whose employment ended between July 1, 1989 and June 30, 1991, *and* who had an interest in the Plan that was not fully vested, along with the beneficiaries of such participants. The second class ("Class II") should consist of all present and former Sea Ray employees who were or are participants and who may be entitled under the Plan's terms to receive a portion of the forfeitures resulting from the termination of employment of the members of putative Class I.

The Internal Revenue Code requires that upon the partial termination of a qualified plan, the rights of all affected employees to benefits accrued as of the date of termination

must become non-forfeitable to the extent they are funded. 26 U.S.C. §411(d)(3). Thus, in the absence of a partial termination, the non-vested portion of the account balances of the Plan participants in putative Class I would be forfeited and reallocated to the accounts of the remaining Plan participants in putative Class II.

The putative Class I defendants have opposed the class certification proposed by plaintiffs. Plaintiffs and the putative Class II defendants propose a compromise, whereby Class I is enlarged.

I agree with the magistrate judge's recommendation, as amended, that the certification most recently suggested by plaintiffs appears to be in the best interest of the members of Classes I and II, and would not be prejudicial to the interests of either. Significantly, all parties agree that there should be two classes of defendant-participants, and that all Rule 23 requirements for class certification are met. The real dispute hinges upon the scope of Class I.

The magistrate judge recommended that the class certifications should be conditional and defined as set forth on Page 11 of the Report and Recommendation. Although the members of putative Class I object to this part of the Report and Recommendation, the magistrate judge's addendum should allay their concerns. Thus, my acceptance of the Report and Recommendation is made in the context of the magistrate judge's observations reflected in the addendum. The specific time period utilized in defining Classes I and II is a fact issue and cannot finally be determined until the proof is adduced at trial. Therefore, employees terminated on or after July 1, 1991 need not be included in Class I at this time, since their inclusion in Class I is more appropriately considered as an issue of fact to be resolved by proof offered at trial. The magistrate judge's recommendation as to this timing issue is

reasonable and practical under the circumstances. Therefore, the court's certification of Class I is conditional and, as recommended by the magistrate judge, plaintiffs and the members of Class II shall be estopped from contending that the argument for expansion of Class I to additional employees outside the initial time frame was not timely asserted by the members of that class.

As to the issues of expenses and attorneys' fees, and whether notice should be given to all class members pursuant to Rule 23(c)(2), none of the parties filed a timely objection. These matters were addressed by the parties and the magistrate judge as a result of issues that arose in the status conference held on December 15, 1992. The parties were then given an opportunity to brief these issues. I agree with the magistrate judge's recommendation that all administrative expenses, attorneys' fees, and fees of experts, if any, will be paid from Plan assets, subject to approval of both the administrative committee for the Plan and the court as to the amount of any such expenses. Further, I agree that all class members must be provided with notice of this action.

Therefore, in accordance with the above, it is hereby ORDERED that plaintiffs' motion for class certification is GRANTED. It is further ORDERED that notice be provided to all participants who fall within defendant Classes I and II, in the form proposed by counsel for the Class I defendants in the exhibit to their memorandum [Doc. No. 50], with the correction on Page 3 thereof under the heading "Class Determinations," to correctly set forth the composition of Classes I and II as conditionally certified by the court. It is further ORDERED that the administrative expenses, attorneys' fees, and fees of experts, if any, shall be paid from Plan assets, subject to approval of both the administrative committee and the court as to the amount of any such expenses.

**ENTER:**

/S/
James H. Jarvis
UNITED STATES DISTRICT JUDGE

97-5958

FILED

MAR 11, 1999

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIX CIRCUIT

| | | |
|---|---|---|
| ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL., | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | ORDER |
| DANIEL ROBINSON, ET AL. (CLASS I) | ) | |
| Defendants-Appellants, | ) | |
| SHARON BALDOCK, ET AL. (CLASS II), | ) | |
| Defendants-Appellees. | ) | |

**BEFORE:** KENNEDY and COLE, Circuit Judges; and RUSSELL, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Hon. Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/S/
**Leonard Green, Clerk**

# SEA RAY

## EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN

Section 1. Nature of the Plan.

The purpose of this Plan is to enable participating Employees to share in the growth and profitability of Ray Industries, Inc. ("Sea Ray"), a wholly-owned subsidiary of Brunswick Corporation, and to provide Participants with an opportunity to accumulate capital for their future economic security. The Plan is intended to d this without any deductions from Participants' paychecks and without requiring them to invest their personal savings.

The Plan is hereby adopted effective as of December 30, 1986, as an amendment, restatement and continuation of the Ray Employees' Stock Ownership Plan (originally effective as of September 30, 1968). The Plan is a combination of a stock bonus plan (the "ESOP") and a profit sharing plan (the "Profit Sharing Plan"), each of which is qualified under Section 401(a) of the Internal Revenue Code (the "Code"). The ESOP is designed to invest exclusively in common stock of Brunswick Corporation and is an employee stock ownership plan under Section 4975(e)(7) of the Code.

All Trust Assets held under the Plan will be administered, distributed, forfeited and otherwise governed by the provisions of this Plan and the related Trust Agreement. The Plan is administered by an Administrative Committee for the exclusive benefit of Participants (and their Beneficiaries).

* * *

Section 16. Administration.

(a) Administrative Committee - Until June 30, 1990, the Plan will be administered by an Administrative Committee

composed of C. N. Ray, John C. Hedberg and Frederick J. Florjancic, Jr. or such successors as they may designate, serving without compensation. After June 30, 1990, the Plan will be administered by an Administrative Committee composed of at lease three individuals appointed by the Board of Directors of Sea Ray to serve at its pleasure and without compensation. The members of the Committee shall be named fiduciaries with authority to control and manage the operation and administration of the Plan. Members of the Committee need not be Employees or Participants. Any Committee member may resign by giving notice, in writing, to the Board of Directors of Sea Ray.

(b) Committee Action - Committee action will be by vote of a majority of the members at a meeting or in writing without a meeting. A Committee member who is a Participant shall not vote on any question relating specifically to himself unless he is the sole member of the Committee.

The Committee shall choose from its members a Chairman and a Secretary. The Chairman or the Secretary of the committee shall be authorized to execute any certificate or other written direction on behalf of the committee. The Secretary shall keep a record of the Committee's proceedings and of all dates, records and documents pertaining to the administration of the Plan.

(c) Powers and Duties of the Committee - The Committee shall have all powers necessary to enable it to administer the Plan and the Trust Agreement in accordance with their provisions, including without limitation the following:

(1) resolving all questions relating to the eligibility of Employees to become Participants;

(2) determining the appropriate allocations to Participants' Accounts pursuant to Section 6;

(3) determining the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;

(4) authorizing and directing all disbursements of Trust Assets by the Trustee;
(5) establishing procedures in accordance with Section 414(p) of the Code to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders;
(6) engaging any administrative, legal, accounting, clerical or other services that it may deem appropriate;
(7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;
(8) compiling and maintaining at the offices of Sea Ray all records it determines t be necessary, appropriate or convenient in connection with the administration of the Plan; and
(9) reviewing the performance of the Trustee with respect to the Trustee's administrative duties, responsibilities and obligations under the Plan and Trust Agreement.

The Committee shall communicate to the Trustee a funding policy and investment guidelines for Trust Assets (other than Brunswick Stock) that is consistent with the objectives of the Plan and the requirements of ERISA.

The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interest of the Participants (and their Beneficiaries). Any discretion granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on the nondiscriminatory basis.

(d) Expenses - All expenses of administering the Plan and Trust (including Trustee fees) shall be charged to and paid by Sea Ray directly, and payment of expenses by Sea Ray shall not be deemed to be Employer Contributions.

(e) Information to be Submitted to the Committee - To enable the Committee to perform its functions, Sea Ray shall supply full and timely information to the Committee on all matters as the Committee may require, and shall maintain such other records as the Committee may determine are necessary or appropriate in order to determine the benefits due or which may become due to Participants (or Beneficiaries) under the Plan.

(f) Delegation of Fiduciary Responsibility - The Committee from time to time may allocate to one or more of its members and/or may delegate to any other persons or organizations any of its rights, powers, duties and responsibilities with respect to the operation and administration of the Plan that are permitted to be so delegated under ERISA. Any such allocation or delegation shall be made in writing, shall be reviewed periodically by the Committee, and shall be terminable upon such notice as the Committee in its discretion deems reasonable and proper under the circumstances.

(g) Bonding, Insurance and Indemnity - To the extent required under Section 412 of ERISA, Sea Ray shall secure fidelity bonding for the fiduciaries of the Plan.

Sea Ray (in its discretion) or the Trustee (as directed by the Committee) may obtain a policy or policies of insurance for the Committee (and other fiduciaries of the Plan) to cover liability or loss occurring by reason of the act or omission of a fiduciary. If such insurance is purchased with Trust Assets, the policy must permit recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary. Sea Ray shall indemnify (and hold harmless) each member of the committee (to the extent permitted by law) against any personal liability or expense resulting from his service on the Committee, except such liability or expense as may result from his own willful misconduct.

(h) Notices, Statements and Reports - Sea Ray shall be the "Plan Administrator" (as defined in Section 3(16)(A) of ERISA and Section 414(g) of the Code) for purposes of the reporting and disclosure requirements of ERISA and the Code. The

Committee shall assist Sea Ray, as requested, in complying with such reporting and disclosure requirements. The Committee shall be the designated agent of the Plan for the service of legal process.

Section 19. Future of the Plan.

...

If the Plan is terminated (or partially terminated), participation of Participants affected by the termination will end. If Employer Contributions are not replaced by contributions to a comparable plan which meets the requirements of Section 401(a) of the Code, the Accounts of Employees affected by the termination will become nonforfeitable as of the date of termination....

Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

No. 98-1971

# In the Supreme Court of the United States

DANIEL ROBINSON, ET AL., PETITIONERS,

*v.*

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEE'S STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL., RESPONDENTS,

and

SHARON BALDOCK, ET AL., RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.

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32 pp

## QUESTION PRESENTED

Whether the Magistrate Judge, district court, and Sixth Circuit properly determined, on the basis of well-settled law and uncontested facts established through the parties' cross-motions for summary judgment, that respondents' determination that no partial termination of the Plan had occurred was not arbitrary and capricious but reasonable and correct.

## RULE 29.6 STATEMENT

Respondent Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan administers the ESOP plan maintained by the Sea Ray Division of Brunswick Corporation for the benefit of its participant employees. Brunswick Corporation is a publicly traded company. Brunswick Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. At the relevant times, respondents William J. Barrington, Diane M. Yaconetti, and William J. McManaman were members of the Committee and employees of Brunswick Corporation.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED . . . . . i

RULE 29.6 STATEMENT . . . . . ii

STATEMENT . . . . . 1

1. The Plan And Its Partial Termination Provisions . . . . . 1

2. The Plan's Recent History . . . . . 3

3. The Plan Committee's Determination That No Partial Termination Had Occurred . . . . . 5

4. District Court Proceedings . . . . . 6

5. The Sixth Circuit's Decision . . . . . 10

REASONS FOR DENYING THE PETITION . . . . . 11

I. THE SIXTH CIRCUIT'S DETERMINATION THAT THE PLAN GRANTS THE COMMITTEE DISCRETION CORRECTLY APPLIED *FIRESTONE* AND CONFLICTS WITH NO DECISION OF ANY OTHER CIRCUIT . . . . . 11

II. THE SIXTH CIRCUIT APPLIED THE ARBITRARY AND CAPRICIOUS STANDARD CORRECTLY AND CONSISTENT WITH PRECEDENT . . . . . 14

III. THE SIXTH CIRCUIT PROPERLY CONSIDERED THE EVIDENCE SUPPORTING THE PLAN ADMINISTRATOR'S DETERMINATION . . . . . 18

## TABLE OF CONTENTS-Continued

Page

IV. THIS CASE RAISES NO ISSUE ABOUT THE STANDARDS FOR SUMMARY JUDGMENT THAT WARRANTS THIS COURT'S REVIEW . . . . . 20

CONCLUSION . . . . . 22

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Anderson* v. *Great West Life Assurance Co.*, 942 F.2d 392 (6th Cir. 1991) . . . . . 17

*Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) . 21

*Blessing* v. *Deere & Co.*, 985 F. Supp. 899 (S.D. Iowa 1997) . . . . . 16

*Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062 (6th Cir. 1998) . . . . . 15

*Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994) 20

*Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) . . . . 21

*Cvelbar* v. *CBI Ill., Inc.*, 106 F.3d 1368 (7th Cir.), cert. denied, 522 U.S. 812 (1997) . . . . . 15

*Estate of West*, 560 N.W.2d 810 (Neb. 1997) . . . . . 15

*Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989) . . . . . *passim*

*Gauer* v. *Connors*, 953 F.2d 97 (4th Cir. 1991) . . . . 16

*Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996) . . . . . 15

*Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), aff'd *sub nom. Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994) . . . . . 19

*Helton* v. *ACS Group*, 964 F. Supp. 1175 (E.D. Tenn. 1997) . . . . . 16

*James* v. *Louisiana Laborers Fund*, 29 F.3d 1029 (5th Cir. 1994) . . . . . 15, 16

## TABLE OF AUTHORITIES-Continued

**Page**

*Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999) . . . . . 13

*Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994) . . . . . 13

*Lake* v. *Metropolitan Life Ins. Co.*, 73 F.3d 1372 (6th Cir. 1996) . . . . . 15

*Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) . . . . . 21

*Metropolitan Life Ins. Co.* v. *Potter*, 992 F. Supp. 717 (D.N.J. 1998) . . . . . 16

*Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096 (5th Cir. 1990) . . . . . 16

*Perez* v. *Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) . . . . . 13

*Perry* v. *Simplicity Eng'g*, 900 F.2d 963 (6th Cir. 1990) . . . . . 19

*Peter M. Boruta, M.D., P.C.* v. *Commissioner*, 55 T.C.M. (CCH) 670 (1988) . . . . . 20

*Pratt* v. *Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651 (10th Cir. 1990) . . . . 16

*Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154 (1984) . . . . . 19, 20

*Trombetta* v. *Cragin Fed. Bank ESOP*, 102 F.3d 1435 (7th Cir. 1996) . . . . . 15

## TABLE OF AUTHORITIES-Continued

**Page**

*Ulmer* v. *Harsco Corp.*, 884 F.2d 98 (3d Cir. 1989) . . 15

*Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045 (2d Cir. 1990), vacated in part, 933 F.2d 106 (2d Cir. 1991) . . . . . 16

*Wulf* v. *Quantum Chem. Corp.*, 26 F.3d 1368 (6th Cir. 1994) . . . . . 13

**Statutes:**

26 U.S.C. § 401 . . . . . 1

26 U.S.C. § 404 . . . . . 2

26 U.S.C. § 411(d)(3) . . . . . 3, 5

29 U.S.C. § 1002(3) . . . . . 1

29 U.S.C. § 1002(34) . . . . . 1, 2

29 U.S.C. § 1053(a)(1)(B) . . . . . 2

**Miscellaneous:**

BNA, *Quarterly Reps. on Job Absence & Turnover* (1989-90) . . . . . 20

1 Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* (1995) . . . . . 5

## TABLE OF AUTHORITIES-Continued

**Page**

Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance*, 38 Acad. Mgmt. J. 635 (1995) . . . . . 20

IRS, Doc. 6678, *Plan Termination Standards* (1981) . . 20

IRS, *Plan Termination Handbook* . . . . . 14, 19

Rev. Rul. 72-439, 1972-2 C.B. 223 . . . . . 20

Gerald L. White, *Employee Turnover: The Hidden Drain on Profits*, 72 HR Focus 15 (Jan. 1995) . . . . . 20

## STATEMENT

The issue in this case is whether the court of appeals, the district court, and the Magistrate Judge, after considering all of the "facts and circumstances" as required by IRS guidelines, all erred in concluding that there was no partial termination of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Plan") as a result of reductions in employment levels at Sea Ray Boats, Inc. ("Sea Ray") between 1989 and 1991. Respondents, the Administrative Committee of the Plan (the "Committee") and its members William J. Barrington, Diane M. Yaconetti, and William R. McManaman, filed this declaratory judgment action seeking a judicial ruling upholding their determination that there was no partial termination of the Plan. On cross-motions for summary judgment, the district court (applying the deferential standard of review required by *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)) accepted the report and recommendation of the Magistrate Judge and granted summary judgment in favor of respondents. A unanimous panel of the Sixth Circuit affirmed, applying settled law to the undisputed factual record in this case. The court of appeals' case-specific decision was correct (as was the determination made by the Committee that no partial termination of the plan had occurred) and raises no issue meriting this Court's review.

### 1. The Plan And Its Partial Termination Provisions

The Plan is maintained for the benefit of participating employees of Sea Ray. It is a defined contribution stock bonus and profit-sharing plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(3) & (34), and a qualified plan within the meaning of the Internal Revenue Code (the "Code"), 26 U.S.C. § 401.

The Plan is administered by the Committee. Plan Section 16(c) broadly confers on the Committee "all powers necessary

to enable it to administer the Plan." Pet. App. 97. Those powers expressly include "determining the appropriate allocations to Participants' Accounts," "determining the amount of benefits payable to a Participant," and "construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code." *Id.* at 97-98; see *id.* at 7-8.

The Plan is funded by the employer; participating employees make no contributions. Plan assets are allocated to the individual accounts of participating employees. Pet. App. 3. As ERISA and the Code require, each participant's benefits are "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34); 26 U.S.C. § 404; Pet. App. 3.

Sea Ray begins contributing to the Plan on behalf of employees after one year of service. However, employees do not become fully vested in their account balances until they have worked at the company for seven years. Pet. App. 3-4. Vesting occurs gradually according to the following formula:

| *Credited Service* | *Vested Percentage* |
|---|---|
| Less than 3 years | 0% |
| 3 years | 20% |
| 4 years | 40% |
| 5 years | 60% |
| 6 years | 80% |
| 7 years | 100% |

Plan § 10, C.A. App. 59-60; Pet. App. 3-4. ERISA expressly permits gradual vesting using this formula. 29 U.S.C. § 1053(a)(1)(B); Pet. App. 3.

In usual circumstances, if an employee leaves the company before completing seven years of service, the nonvested (or forfeitable) portion of his or her account balance is reallocated among remaining Plan participants. Plan §§ 6, 10, C.A. App. 52, 60; Pet. App. 4. However, under the terms of Plan Section 19, if there is a partial termination of the Plan, the account balances of the participants affected by the partial termination become fully vested (nonforfeitable), and the terminated employees are entitled to retain their full account balances without regard to years of service. Pet. App. 4, 100. Section 19 was included in the Plan in order to assure its favorable tax treatment. Code Section 411(d)(3) provides that, in order to be tax qualified, a plan must include a provision that "upon its termination or partial termination * * * the rights of all affected employees to benefits accrued to the date of such termination [or] partial termination * * * or the amounts credited to the employees' accounts, are nonforfeitable."

**2. The Plan's Recent History**

Sea Ray manufactures and sells a full line of fiberglass motor boats and yachts. Purchase of these high-ticket, durable goods is postponable. In consequence, Sea Ray's business is greatly affected by fluctuations in the economy. C.A. App. 871; Pet. App. 3, 28.

The U.S. boating industry went through an unprecedented cyclical expansion during the 1980s. "Growth surged an average of 35 percent per year from 1983 through 1986, and sales remained at historically high levels from 1986 through 1988." Pet. App. 27. Boat sales then "dropped sharply in 1989 through 1991" and remained flat through 1993. C.A. App. 875, 877. Sea Ray's sales mirrored these trends. From 1985 to 1988, the number of boats Sea Ray sold increased substantially. Sea Ray added $100 million in volume to its business every year. Pet. App. 27. Then, starting with a relatively small decline from 1988 to 1989, the number of boats sold dropped precipitously

through 1991. The decline in sales in 1989 was across all product lines except luxury yachts. Yachts continued to sell relatively well until 1990, when a federal luxury tax targeted high-ticket consumer goods. *Id.* at 4-5, 29, 65. Sea Ray's sales for this time frame were as follows (*id.* at 30):

| *Year* | *Units Sold* |
|---|---|
| 1985 | 12,456 |
| 1986 | 15,916 |
| 1987 | 22,355 |
| 1988 | 24,538 |
| 1989 | 23,214 |
| 1990 | 14,343 |
| 1991 | 10,542 |

The expansion and subsequent contraction in boat sales were reflected in the number of Plan participants. As of July 1, 1985, there were 1,501 participants employed at seven locations. Cmplt. ¶ 50; Pet. App. 27. By July 1, 1989, Sea Ray had expanded to thirteen locations and there were 3,832 Plan participants. Cmplt. ¶ 51; Pet. App. 27. The total number of participants during the 1989-1990 Plan year was 4,084—the number at the beginning of the year, 3,832, plus the number added during the year, 252. Pet. App. 38-39.

Unfavorable economic conditions and declining sales beginning in 1989 forced Sea Ray to consolidate operations, close plants, and reduce its workforce. In 1990, Sea Ray closed one plant and consolidated operations at several more. Pet. App. 31-34. By June 30, 1990, the number of Plan participants had declined to 3,060. Cmplt. ¶ 52; Pet. App. 29. The total number of Plan participants during the 1990-1991 Plan year was 3,111—the number at the beginning of the year, 3,060, plus the number added during the year, 51. Pet. App. 39. For the two Plan years 1989-1991, the total number of participants was

4,139—the number at the beginning of the period, 3,832, plus 303 participants added during the period. *Ibid.* Poor conditions continued into 1991. In that year, Sea Ray closed another plant (*id.* at 35), and by June 30, 1991, the number of Plan participants had declined to 1,968. Cmplt. ¶ 53; Pet. App. 29-30.[1]

### 3. The Plan Committee's Determination That No Partial Termination Had Occurred

The decline in Plan participation raised concerns among the members of the Committee that a partial termination might have occurred during the 1989-1990 and 1990-1991 Plan years. Exercising its Section 16 powers to interpret the Plan and determine allocations to participants' accounts, the Committee discussed the partial termination question at two June 1992 meetings. At its June 12, 1992 meeting, the Committee considered figures on terminations as reflected on Sea Ray's Plan Termination Reports (C.A. App. 696-862), including the reasons for those terminations. *Id.* at 864. The Committee summarized the cyclical business reasons for the decline in Plan participation and discussed the governing legal standards, including the "facts and circumstances" test for partial termination that has been adopted in administrative and judicial interpretations of Code Section 411(d)(3). C.A. App. 864-866; Pet. App. 5-6, 24-25.

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[1] Terminations of Plan participants did not create or increase the possibility of a reversion of Plan assets to Sea Ray. Reversion is not a possibility with a defined contribution profit-sharing and ESOP like the Sea Ray Plan. See 1 Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* 293 (1995) ("A profit-sharing or stock bonus plan cannot return any of its assets to the employer. Thus, forfeitures by participants must be reallocated to other participants"). Under ERISA, the Plan could not and did not include a provision that would allow reversion.

Subsequently, at its June 26, 1992 meeting, the Committee determined that no partial termination had occurred, expressly utilizing the "facts and circumstances" test. C.A. App. 868; Pet. App. 6, 25. The Committee

> discussed the fact that layoffs were dictated by business conditions in a cyclical business. * * * The Committee members concluded that there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of a Partial Termination. It was noted that forfeitures would not reduce the Company's required contributions or create or increase the possibility of a reversion to the Company. It was also noted that the terminations were not motivated by a desire to discriminate in favor of highly compensated employees, as evidenced by the fact that terminated employees were the first to be recalled as jobs became available.

C.A. App. 868. Thus, the Committee determined that participants who terminated employment at Sea Ray from 1989 to 1991 and who were not fully vested in their account balances were not entitled to become fully vested. The nonvested portions of their account balances would be forfeited and allocated to the remaining participants in the Plan. The Committee held the reallocation of these forfeitures in abeyance until it obtained a judicial determination of whether there had been a partial termination of the Plan. *Id.* at 869; Cmplt. ¶¶ 61-62.

**4. District Court Proceedings**

The Committee filed this declaratory judgment action, naming two putative classes as defendants. Class I defendants—petitioners here—are all the former Sea Ray employees (and their beneficiaries) who were participants in the Plan, whose service at Sea Ray ended between July 1, 1989, and June 30, 1991, and who had an interest in the Plan that was not fully

vested when their employment ended. Class II defendants—co-respondents here—are all the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. The suit seeks a declaration that there has not been a partial termination of the Plan, that petitioners are thus not entitled to the accelerated full vesting of their account balances that would flow from a partial termination, and that the nonvested portions of petitioners' account balances should therefore be allocated to the remaining Plan participants. Pet. App. 21-22.

The parties filed cross-motions for summary judgment. The Magistrate Judge's comprehensive, 79-page opinion—subsequently "accepted in whole" by the district court (Pet. App. 19)—recommended that the summary judgment motions of the Committee and the Class II defendants be granted and that the motion of the Class I defendants be denied. *Id.* at 88.

Initially, the Magistrate Judge held that the Committee's determination that there had been no partial termination could be upset only if it was arbitrary and capricious. Following *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a plan administrator's exercise of discretionary powers granted by the plan is reviewed for abuse of discretion. Pet. App. 39-45. Here, the Magistrate Judge reasoned, Plan Section 16(c) granted the Committee "all powers necessary * * * to administer the Plan," including authority to "construe and interpret the Plan," determine "appropriate allocations to Participants' Accounts," and determine "the amount of benefits payable to a Participant." Thus, the "Plan clearly grants the Committee the authority to interpret the term 'partial termination,'" which appears in Plan Section 19. And whether there had been a partial termination affects appropriate allocations to participants' accounts and the amount of their benefits. *Id.* at 44-45.

The Magistrate Judge then concluded that the Committee's determination was reasonable and not arbitrary and capricious. Following Sixth Circuit precedent, the Magistrate Judge reasoned that under the IRS's "facts and circumstances" test, "two general inquiries" are relevant to whether there has been a partial termination: "the percentage of Plan participants who were involuntarily excluded from the Plan" and "the motives of the decision maker." Pet. App. 57.

*Percentage of involuntary terminations.* To determine the percentage of involuntary terminations, the Magistrate Judge found that "the Plan should be analyzed in separate years" because "[t]he circumstances surrounding the large boat layoffs [in 1990-1991] were distinctly different than those for the small boats" in 1989-1990. After yachts continued to sell well in 1989-1990, the federal luxury tax resulted in an "additional large wave of layoffs" in 1990-1991 that otherwise would not have occurred. Pet. App. 64-65.

The Magistrate Judge also found that voluntary terminations from Sea Ray should not be counted for purposes of determining whether there had been a partial termination. Thus, 648 employees who, during the two-year period in issue, quit voluntarily, retired, died, or became disabled were excluded from the relevant terminations. The Magistrate Judge rejected petitioners' argument that all terminations after layoffs began should be regarded as involuntary on a "constructive discharge" theory. Pet. App. 66, 75, 79. With these principles in mind, the Magistrate Judge calculated the percentage reductions using the following formula (*id.* at 80-81):

$$\frac{\text{Total reduction - excludable employees}}{\text{Total participants including those added during year,}}$$

which produced these percentage reductions in each of the Plan years in issue:

1989-1990: $\frac{1,024 - 373}{4,084} = 15.9\%$

1990-1991: $\frac{1,143 - 275}{3,111} = 27.9\%.$

The total percentage reduction for both Plan years together was less than 40%:

1989-1991: $\frac{2,167 - 648}{4,139} = 36.7\%.$

The Magistrate Judge agreed with petitioners that, "generally, a percentage [reduction in plan participants] above 50 percent will be determinative of the occurrence of a partial termination." "[F]igures below 20 percent" will rarely indicate a partial termination. Reviewing the case law, the Magistrate Judge recognized that when terminations are between 20 percent and 50 percent, a "sliding scale" applies. Between those figures, the percentage reduction "will be significant only if combined with other factors," in particular evidence of employer abuse of the plan or bad faith. Pet. App. 76-77.

*Employer motives.* The Magistrate Judge acknowledged that an employer may act in bad faith and abuse a plan by excluding participants to increase the amount of a reversion of plan assets to the employer, to increase the plan benefits of a favored group of employees, or to decrease the employer's contributions to the plan. Pet. App. 82-83. As the Magistrate Judge noted, however, petitioners did "not argue that Sea Ray was motivated by improper motives in terminating the employees," and "[there is] [n]o evidence of abuse" of the tax qualified status of the Plan. *Id.* at 83.

The district court accepted the "exceptionally well-reasoned" report and recommendation of the Magistrate Judge. Pet. App. 17. The court held that the Magistrate Judge "was clearly correct" in applying the arbitrary and capricious standard of

review, and that it was "entirely reasonable" to analyze each year separately because of the "distinct causes" of the layoffs in each year. *Id.* at 18-19. After "carefully conduct[ing] a *de novo* review of the record," the district court "agree[d] that the percentage of Plan participants terminated was insufficient for a finding of a partial termination" and that the motions of the Committee and Class II for summary judgment should therefore be granted. *Id.* at 17, 19.

**5. The Sixth Circuit's Decision**

The Sixth Circuit reviewed *de novo* the district court's grant of summary judgment and upheld that decision without dissent. Pet. App. 7. The court of appeals held that "a plain reading of the Plan reveals that it clearly grants discretion to the Committee." *Id.* at 9. It rejected arguments that the Committee lacked discretion to determine whether a partial termination had occurred because the Plan does not define the term "partial termination," and that "eligibility determinations are questions of law subject to de novo review." *Id.* at 9-10. The court thus proceeded to "review the Committee's determinations regarding partial terminations under the arbitrary and capricious standard." *Id.* at 10.

In calculating the percentage of Plan participants who were involuntarily terminated, the court of appeals held "that the economic downturn in 1989 and the federal luxury tax in 1990 * * * stem from two independent factors." Pet. App. 12-13. The court also held that, under governing law, the record could not support a finding that everyone who left Sea Ray after layoffs began was "constructively discharged." *Id.* at 13. Accordingly, the Sixth Circuit agreed with the percentages used by the district court. *Id.* at 14.

Finally, the court considered "the effects on the plan" and "the employer's motives." Pet. App. 14. The court "dismissed" both factors, since no party had alleged that layoffs at Sea Ray

"financially impaired" the Plan or that "Sea Ray was motivated by improper motives." *Id.* at 15.

The court of appeals concluded that the Committee's determination "was neither arbitrary nor capricious." In light of "the percentage of terminations" and "the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated." Pet. App. 15. The court summarily denied Class I's petition for panel or en banc rehearing. *Id.* at 94-95.

## REASONS FOR DENYING THE PETITION

The petition for certiorari asks this Court to decide fact-bound issues that were correctly decided by the courts below. None of the questions presented raises an important or recurring legal issue as to which there is a conflict among the circuits, and none warrants this Court's review. We address each of the four questions presented by petitioners in turn.

### I. THE SIXTH CIRCUIT'S DETERMINATION THAT THE PLAN GRANTS THE COMMITTEE DISCRETION CORRECTLY APPLIED *FIRESTONE* AND CONFLICTS WITH NO DECISION OF ANY OTHER CIRCUIT.

Petitioners ask this Court (Pet. 9) to review the Sixth Circuit's determination that on a "plain reading," the language of Section 16(c) of the Plan "clearly grants discretion to the Committee" to determine whether a partial termination has occurred. Pet. App. 9-14. The Magistrate Judge, the District Judge, and the unanimous court of appeals all concurred in this interpretation of the particular language of the Sea Ray Plan. Petitioners purport to identify inconsistencies in the case law concerning the interpretation of plan language. The plan language at issue in the decisions cited by petitioners, however, is *different* from the language of the Sea Ray Plan and irrelevant

to this case. The "conflicts" petitioners identify are therefore all nonexistent. Petitioners point to *no* authority that casts any doubt on the correctness of the lower courts' considered interpretation of Section 16(c) of the Plan.

The court of appeals engaged in a very standard application of the test set forth in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), assessing "whether the ERISA plan grants the administrator 'authority to determine eligibility for benefits or to construe the terms of the plan.'" Pet. App. 9 (quoting *Firestone*). The court noted that Section 16(c) made express reference to the Committee s "discretion" and specifically gave the Committee powers to determine allocations to participants' accounts, to determine what benefits are payable, and to construe and interpret the Plan—all of which powers were involved in the Committee's determination that no partial termination had occurred. Pet. App. 7-8. The court properly held that the plain language of Section 16(c) thus easily satisfies the *Firestone* standard. *Id.* at 9; see *Firestone*, 489 U.S. at 111 (when a trustee is "given power to construe disputed or doubtful terms * * * the trustee's interpretation will not be disturbed if reasonable").

Petitioners assert that there are conflicts among the courts of appeals in their application of *Firestone* to particular plan language, but none of those alleged conflicts involves issues or plan language anything like the controlling plan language here. For example, petitioners contend (Pet. 9-10) that there is a split of authority between courts that say only a "clear grant of discretion" triggers deferential review of plan administrators' decisions and those that say that discretion may be implied. But whether or not there is any such disagreement, this case plainly does not present that issue for resolution. No party to this litigation has ever claimed that the Plan's grant of discretion should be implied from the Plan language. The Committee

argued—and the courts below all agreed—that the Plan language here "clearly grants discretion to the Committee." Pet. App. 9.

Equally unavailing is petitioners' request (Pet. 10-11) that the Court should resolve an asserted conflict between *Perez* v. *Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (en banc), and *Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999) (en banc). Those cases concern whether plan language requiring "satisfactory" proof of disability conferred discretion on a plan administrator. That question, too, is not presented by this case; no remotely similar issue or plan language is implicated here.

There is no inconsistency (Pet. 13) between the Sixth Circuit's decision here and either its prior ruling in *Wulf* v. *Quantum Chem. Corp.*, 26 F.3d 1368 (6th Cir. 1994), or the Eleventh Circuit's decision in *Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994). In finding that the plan in *Kirwan* did not grant discretion, the court emphasized that the plan—unlike the Sea Ray Plan—contained "no grant of authority to construe [the plan's] terms." 10 F.3d at 789. The plan at issue in *Wulf* provided "nothing more than a grant of authority to make rules for the administration of the Plan, with the provision that the committee's decision respecting any dispute as to the meaning or application of the rules is final"; it nowhere contained any grant of authority to interpret the plan. 26 F.3d at 1374. In contrast, the Sea Ray Plan broadly grants the Committee the power to determine allocations to participants' accounts, to determine what benefits are payable, and to construe and interpret the Plan. Like the other cases cited by petitioners, *Kirwan* and *Wulf* do not address any issue raised by this case.

As the cases cited above demonstrate, the courts of appeals have shown themselves perfectly capable of construing plan language to determine if the specific plan at issue grants discretion to the plan administrator to make a particular

determination, thereby triggering review solely for reasonableness. The inquiry whether a plan grants discretion depends entirely on the language of the specific plan. Petitioners have provided no reason why this Court should get involved in parsing the language of the Sea Ray Plan, nor have they explained how its doing so would assist the lower courts.

## II. THE SIXTH CIRCUIT APPLIED THE ARBITRARY AND CAPRICIOUS STANDARD CORRECTLY AND CONSISTENT WITH PRECEDENT.

Petitioners also complain (Pet. 14-18) about the court of appeals' use of the arbitrary and capricious standard to review certain elements of the Committee's partial termination determination. Petitioners again rely on a claimed split of authority regarding issues not presented by this case, and again fail to identify any issue appropriate for decision by this Court.

1. Petitioners assert that the Committee's partial termination determination resolved a "question of law" and was "a matter of statutory interpretation." Pet. 14. Petitioners contend that a court should give no deference to a plan administrator's resolution of such a question.

The inquiry whether a partial termination has occurred is, however, *intensely factual*. As the court of appeals explained, whether there has been a partial termination depends, under governing law, on "all the facts and circumstances." Pet. App. 11. The relevant "facts and circumstances" include whether there has been a "sharp reduction in levels of plan participation; [an] increase in the possibility of discrimination in favor of officers, shareholders or highly-compensated employees; [or] the creation or increase of the possibility that plan assets may revert to the employer," none of which factors is by itself controlling. *Id.* at 51-52 (citing IRS, *Plan Termination Handbook* § 252). This Court need not expend its limited resources reviewing the

unexceptionable, fact-specific application of a well-established multi-factor test.

Even if the Committee's partial termination decision could be described as the determination of a "question of law," that would be of no consequence. This Court's decision in *Firestone* and lower court precedent would still require use of the arbitrary and capricious standard of review. Indeed, *Firestone* itself concerned the interpretation of a benefit plan—that is, the interpretation of a contract and trust document—which is always a question of law. *Firestone*, 489 U.S. at 114-115; see, *e.g.*, *Lake* v. *Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1376-1377 (6th Cir. 1996) (level of benefits available under a plan is "a matter of contract interpretation"); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996) ("[q]uestions of contract interpretation are generally considered questions of law"); *Ulmer* v. *Harsco Corp.*, 884 F.2d 98, 101-102 (3d Cir. 1989) (plan interpretation is a question of law); *Estate of West*, 560 N.W.2d 810, 812 (Neb. 1997) ("interpretation of the words of * * * a trust is a question of law").

Since *Firestone*, lower courts have routinely applied the arbitrary and capricious standard to review plan administrators' interpretations of plan terms that involve legal concepts and statutory terms. See *Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066-1068 (6th Cir. 1998) (arbitrary and capricious standard applies to plan administrator's determination under plan language that "simply mirror[ed]" Code provision); *Cvelbar* v. *CBI Ill., Inc.*, 106 F.3d 1368, 1379-1380 (7th Cir.) (reviewing for reasonableness plan administrator's interpretation of Code provision referred to in plan), cert. denied, 522 U.S. 812 (1997); *Trombetta* v. *Cragin Fed. Bank ESOP*, 102 F.3d 1435, 1438-1439 (7th Cir. 1996) (reviewing for reasonableness determination that plaintiffs were not "employees"); *James* v. *Louisiana Laborers Fund*, 29 F.3d 1029, 1032-1033 (5th Cir. 1994) (reviewing for reasonableness determination that rested on

interpretation of state criminal law); *Metropolitan Life Ins. Co.* v. *Potter*, 992 F. Supp. 717, 728-730 (D.N.J. 1998) (reviewing for abuse of discretion determination that death was not "accidental" as defined by case law); *Blessing* v. *Deere & Co.*, 985 F. Supp. 899, 906-907 (S.D. Iowa 1997) (reviewing for reasonableness determination regarding existence of common law marriage under state law); *Helton* v. *ACS Group*, 964 F. Supp. 1175, 1179-1180 (E.D. Tenn. 1997) (reviewing for reasonableness interpretation of state criminal law).

Petitioners are wrong when they assert, without analysis, that *Gauer* v. *Connors*, 953 F.2d 97 (4th Cir. 1991), and *Pratt* v. *Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651 (10th Cir. 1990), are to the contrary. Pet. 14. In *Gauer*, the question was not how to interpret the plan, but "whether the Trustees' interpretation of the Pension Plan [was] consistent with ERISA regulations." 953 F.2d at 100. The case thus concerned only the construction of the regulations, and not of any plan language. In *Pratt*, the court found that the plan gave the plan administrators discretion "to decide questions of plan interpretation." 920 F.2d at 658. The court accordingly applied the arbitrary and capricious standard and overturned the plan administrator's decision only because it was "unreasonable" and contrary to the plan's "unambiguous" provisions. *Id.* at 660, 662. To the extent that *Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045 (2d Cir. 1990), vacated in part, 933 F.2d 106 (2d Cir. 1991), and *Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096 (5th Cir. 1990), suggest a different analysis than that applied by the courts below, they are aberrational decisions that have not been followed in the more recent cases cited above, even in their own circuits. See *James*, 29 F.3d at 1032-1033 (the Fifth Circuit reviewed a plan administrator's determination of a state law question for abuse of discretion).

2. Petitioners also claim that the courts of appeals are divided over the appropriate standard of review for plan administrators' *factual* determinations. Pet. 15-16. Even if there were such a disagreement, it would provide no basis for review of this case. The issue of the standard of review for factual determinations was not addressed below because petitioners did not raise it in their briefs to the court of appeals and therefore waived it. Moreover, the issue has no bearing on the outcome of this case, which was decided on cross-motions for summary judgment, with all parties agreeing that the dispositive facts are not in dispute.[2]

In any event, even if deference to a plan administrator's fact finding were appropriate only when the plan grants discretion to make factual determinations, Section 16 of the Sea Ray Plan clearly provides that authority. See Pet. App. 97-98 (Plan grants Committee power to "resolv[e] all questions relating to the eligibility of Employees," to "determin[e] the appropriate allocations to Participants' Accounts," and to "determin[e] the amount of benefits payable").[3] The applicability of *Firestone* to

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[2] Petitioners' arguments about the lower courts' separation of plan years and treatment of the constructive discharge issue (Pet. 23-26) do not reflect any disagreement over the facts. The questions petitioners raise concern only whether the lower courts applied appropriate legal standards (regarding when plan years should be considered separately and when an employee should be considered constructively discharged) to the undisputed factual record.

[3] Petitioners' reliance on *Anderson* v. *Great West Life Assurance Co.*, 942 F.2d 392 (6th Cir. 1991), is badly misplaced. See Pet. 17 n.7. The court there made *no* determination regarding the effect of plan language granting the administrator the power "to determine the amount of the benefits." The court merely found that the district court had improperly relied on pre-*Firestone* precedent, and it remanded the case to the district court for reconsideration using the correct legal standard. 942 F.2d at 394-396.

purely factual determinations ought to be considered, if at all, in the context of a case in which the question was actually litigated and is genuinely in controversy.

Petitioners conclude (Pet. 17) with a plea that there is, in general, a "need for further guidance on these [two] issues." But the specific plan language and facts underlying *this* case present no difficult or disputed questions. This litigation presents no occasion for the Court to provide "further guidance" on the issues that, petitioners claim, vex other ERISA cases.

## III. THE SIXTH CIRCUIT PROPERLY CONSIDERED THE EVIDENCE SUPPORTING THE PLAN ADMINISTRATOR'S DETERMINATION.

1. Petitioners ask this Court to review the issue "whether the court was limited to considering the evidence considered by the Committee" on *de novo* review. Pet. 18. The question of what evidence may be considered on *de novo* review is irrelevant here because, as the courts below properly held, under *Firestone*, judicial review of the Committee's discretionary decision was for abuse of discretion, not *de novo*.

Putting that defect aside, petitioners' argument is a red herring. The Committee had before it ample evidence to justify its decision and every basis upon which the Magistrate Judge, district court, and court of appeals upheld the reasonableness of that decision.

As petitioners have conceded (C.A. Opening Br. 39-40), the Committee was presented with figures on terminations as reflected in Sea Ray's Termination Reports, including the reasons for and timing of those terminations. See C.A. App. 696-862, 864. Those figures and reasons, the timing of terminations, the uncontested lack of any possibility of reversion of forfeitures to the company, and the uncontested absence of improper motives for the Committee's determination were the facts relevant to the decisions of the Committee and of the

reviewing courts alike. Pet. App. 5-6. The conflict petitioners say exists among the circuits over whether new evidence can be a proper basis for finding a plan administrator's decision reasonable (*id.* at 18-20) is therefore irrelevant to any issue in this case, which has been decided throughout on the basis of evidence before the Committee. *Cf. Perry* v. *Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (identifying an issue as to whether *Firestone* requires "district courts to hear and consider evidence *not presented to* the plan administrator") (emphasis added).

2. Petitioners pose (Pet. 19, 25) the different question whether a court, reviewing the evidence before the plan administrator, may find the administrator's determination reasonable based in part on additional grounds not articulated by the administrator.

Petitioners point to only one factor relied on by the courts below that was not explicitly set forth in the Committee's minutes: measuring the percentage of terminations in each of the two plan years at issue separately. Pet. 20, 25. But the Committee was well aware of the link between terminations in large yacht facilities in 1990-91 and the new luxury tax. See Pet. App. 65. Anyway, separating out the plan years, *regardless of whether the luxury tax initiated a second "corporate event,"* is correct as a matter of law. See *Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154 (1984) (calculating reductions of 34 per cent and 51 per cent in consecutive years before concluding that there was a partial termination); IRS, *Plan Termination Handbook* § 252(5)(c), C.A. App. 663 (separating the *Tipton* reductions into two years).[4]

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[4] Petitioners cite the district court's decision in the *Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), to try to cast doubt on the proposition that it is legally correct to measure terminations year by year. Pet. 24. But in affirming *Gulf Pension*,

Moreover, even if terminations here were aggregated over the 1989-91 period, they totaled less than 38%. Pet. App. 80-81. In the absence of plan abuse, which has never been alleged here, it is not unreasonable to find that a 38% reduction in plan participation over two years did not amount to a partial termination. Pet. App. 76-77; *cf.* IRS, Doc. 6678, *Plan Termination Standards* 2 (1981) (citing rulings that 57.5 per cent and 80 per cent reductions were partial terminations); *Tipton & Kalmbach* (34 per cent and 51 per cent reductions in successive years were partial termination); *Peter M. Boruta, M.D., P.C.* v. *Commissioner*, 55 T.C.M. (CCH) 670 (1988) (66-2/3 per cent); Rev. Rul. 72-439, 1972-2 C.B. 223 (70 per cent). Given turnover rates in industry that average 15-20% per year, even in normal times, employers may commonly experience turnover in the region of 38% over two years.[5]

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the Fifth Circuit stated that because it did not decide the partial termination question, the district court's (controversial) views on that issue were not conclusive even between the parties. *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1314 n.11 (5th Cir. 1994).

[5] See, *e.g.*, Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance*, 38 Acad. Mgmt. J. 635 (1995) (survey of major industries showed average turnover of 18.36 per cent); Gerald L. White, *Employee Turnover: The Hidden Drain on Profits*, 72 HR Focus 15 (Jan. 1995) (in "many industries * * * turnover rates exceed 75 percent"); BNA, *Quarterly Reps. on Job Absence & Turnover* (1989-90) (C.A. App. 882-889) (median turnover rate for all companies for the year beginning July 1989 was 12.2 per cent).

## IV. THIS CASE RAISES NO ISSUE ABOUT THE STANDARDS FOR SUMMARY JUDGMENT THAT WARRANTS THIS COURT'S REVIEW.

Petitioners ask this Court to grant certiorari to consider whether the court of appeals erred by applying a "clearly erroneous" standard of review to "findings" by the district court (1) that terminations could properly be measured in separate plan years because the wave of terminations that occurred during the second plan year was triggered by the luxury tax, (2) that the Committee did not have to treat every person who voluntarily left employment after layoffs began as having been constructively discharged, and (3) adopting Class II's termination figures. Petitioners suggest that use of a "clearly erroneous" standard was inappropriate on review of the grant of a motion for summary judgment, because the proper standard is whether there is any material and genuine issue of disputed fact. Pet. 21-26.

The standards for ruling upon and reviewing rulings upon motions for summary judgment are well established and well understood by the lower courts. *E.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). The court of appeals correctly stated those standards at the outset of its opinion. Pet. App. 7. It noted that summary judgment is appropriate only where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law," and it explained that "[t]his court draws all reasonable inferences in favor of the non-moving party." *Ibid.* The court of appeals also stated that it reviews the district court's grant of summary judgment under these standards *de novo*. *Ibid.*

Petitioners have made no pretense that there is confusion in the lower courts about the proper standard of review of grants of summary judgment. At best, petitioners' claim is that this

Court should review the Sixth Circuit's decision because, having correctly stated the applicable standard for review of the district court's decision on cross-motions for summary judgment at the outset, the court of appeals then misstated the standard later in the opinion. Pet. App. 12. That hardly presents a certworthy issue.

Review of the applicability of the "clearly erroneous" standard is particularly unnecessary because the district court did not make any factual findings. Rather, the district court reviewed the Committee's determination to see if, based on the facts before the Committee, that determination was reasonable. That reasonableness inquiry did not require resolving any factual disputes or making any factual findings. See note 2, *supra*. For example, it was *the Committee* that excluded from the termination figures Plan participants who voluntarily left Sea Ray after layoffs began—not the district court. See Pet. App. 67. The district court merely determined that, in light of the settled law of constructive discharge, that exclusion had not been unreasonable. *Id.* at 72-76. The district court's rejection of petitioners' termination figures simply followed from its conclusion that the Committee had not acted unreasonably in excluding certain participants—because petitioners' figures included as terminees participants who had been excluded by the Committee. Pet. App. 81-82. Thus, no amount of hand wringing about the role of the clearly erroneous standard in ERISA summary judgment cases could lead to a different result in this case. There is no sign at all that the courts of appeals are confused about the correct standard of review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1971

In The

# Supreme Court of the United States

DANIEL ROBINSON; et al. ("Class I");
*Petitioners/Defendants*,

vs.

ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEES' STOCK OWNERSHIP &
PROFIT SHARING PLAN et al.
*Respondents/Plaintiffs*,

and

SHARON BALDOCK; et al. ("Class II")
*Respondents/Defendants*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY TO THE BRIEFS IN OPPOSITION

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15 pp

## Questions Presented

I.

A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Whether a Plan Administrator's Decision May be Upheld on Grounds Other Than Those Given or Considered by the Plan Administrator Regardless of the Standard of Review.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

Table of Contents

Questions Presented ..... i

Table of Authorities ..... iv

Argument ..... 1

I.A. Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard. ..... 1

B. Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred. ..... 5

C. Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator. ..... 5

II. Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred. ..... 9

Conclusion ..... 10

Table of Authorities

**Cases**

***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981 (6th Cir. 1999) ..... 4

***Bogue v. Ampex Corp.***, 976 F.2d 1319 (9th Cir. 1992) ... 4

***Carpenter Local 1027 v. Lee Lumber & Building Material Corp.***, 2 F.3d 796 (7th Cir. 1993) ..... 5

***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989) ..... i, 1, 3-6

***Kearney v. Standard Insurance Co.***, 175 F.3d 1084 (9th Cir. 1999) ..... 2

***Kinstler v. First Reliance Standard Life Insurance Co.***, 181 F.3d 243 (2nd Cir. 1999) ..... 1-4

***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***, 833 F.2d 74 (6th Cir. 1987) ..... 6

***Lechmere Inc. v. NLRB***, 502 U.S. 527 (1992) ..... 7

***Maislin Industries, U.S. Inc. v. Primary Steel, Inc.***, 497 U.S. 116 (1990) ..... 7

***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550 (6th Cir. 1998) ..... 2

***Weil v. Retirement Plan Administrative Committee of The Terson Co., Inc.***, 933 F.2d 106 (2nd Cir. 1991) ... 6

**Statutes, Regulations and Other Authorities**

26 U.S.C. § 411(d)(3) ..... 5, 6

26 U.S.C. §401(a)(7) ..... 6

## Argument

I.
A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

For purposes of the petition for certiorari the issue is ***not*** whether the courts of appeals disagree on how to interpret ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101(1989). Respondents acknowledge (somewhat begrudgingly) the split of authority on this issue. Committee brief p. 13 (referring to the "asserted conflict") Class II brief p. 17 ("While it is true that the circuits ***disagreed***. . . .)

Before addressing Respondents' arguments in opposition to the petition, however, Petitioners invite the Court's attention to the decision in ***Kinstler v. First Reliance Standard Life Insurance Co.***, 181 F.3d 243 (2nd Cir. 1999), pet. for rehearing & sug. reh. en banc den. Aug. 18, 1999, of which Petitioners were not aware until after their petition was filed. The plaintiff in ***Kinstler*** sought long term disability benefits, which the plan denied for essentially factual reasons. Plaintiff sought judicial review, arguing that the plan administrator's decision was subject to de novo review under ***Firestone***. The court of appeals agreed.

The Second Circuit acknowledges that "***appellate judges are divided on the issue of what language suffices to convey to plan administrators the discretionary authority*** that warrants the more deferential arbitrary and capricious standard

of review." 181 F.3d at ___ (emphasis added). The plan language at issue in ***Kinstler*** is similar to the plan language at issue in ***Kearney v. Standard Insurance Co.***, 175 F.3d 1084 (9th Cir. 1999) (en banc), petition for cert. filed no. 99-186, 68 U.S.L.W. 3131, and ***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550, 555 (6th Cir. 1998) (en banc). Following ***Kearney*** and rejecting ***Perez***, the Second Circuit held that the ambiguous language in the plan was not sufficient to convey discretionary review status. The Second Circuit reasoned that because the plan administrator bears the burden of proving that the arbitrary and capricious standard applies, needless ambiguities should be resolved against the plan administrator:

> Though we reiterate that no one word or phrase must always be used to confer discretionary authority, the administrator's burden to demonstrate insulation from de novo review requires either language stating that the award of benefits is within the discretion of the plan administrator or language that is plainly the functional equivalent of such wording. Since clear language can be readily drafted and included in policies, even in the context of collectively bargained benefit plans when the parties really intend to subject claim denials to judicial review under a deferential standard, courts should require clear language and decline to search in semantic swamps for arguable grants of discretion.

___ F.3d at ___. The issues in ***Kinstler*** are the same issues raised in parts A and B of question 1 in the petition.

Respondents (which will be referred to individually as the Committee or Class II) attempt to distinguish the instant case from the acknowledged split of authority. But Respondents' arguments begin with an invalid assumption: that certiorari should only be granted if there is a disagreement in how to

interpret specific plan language. Committee brief p. 12. Aside from the fact that Petitioners have shown there is a dispute between the Sixth Circuit and the Eleventh Circuit with respect to plan language similar to the language in the Sea Ray plan, pet. cert. p. 11-12, Respondents' arguments would relegate this Court to the role of an arbitrator. What is needed are principles for lower courts to follow in determining whether a plan requires deferential review. Whether there is a dispute over how to interpret similar language is not the issue.

While Class II accuses Petitioners of "attempting to draw broad conclusions from judicial determinations that were intensely factual," Class II brief p 18, the very fact that ERISA cases (and these issues in particular) are "intensely factual" establishes the need for guidance from the Court. With 9,000 ERISA claims filed each year, federal courts are hip deep in ERISA claims. Pet. Cert. p. 20. They do not have the resources to "search in semantic swamps for arguable grants of discretion." ***Kinstler***, 181 F.3d at ___.

Respondents, accompanied by the Sixth Circuit, argue that the Plan required discretionary review because it gave the Committee the authority to determine who is eligible to be a "participant," the "amount" of benefits, and determine "allocations to participants accounts." Each argument is incorrect. Determining whether a statutory "partial termination" has occurred has ***absolutely nothing*** to do with "participant" status; it has even less to do with the "amount" of a benefit. The class members are, by definition, "participants" or else they would not be parties to this action. ***Firestone***, 489 U.S. at 117-18. Furthermore, no one has ever made a rational argument that the partial termination inquiry considers the "amount" of benefits that might be received.

Likewise, the Committee's argument that discretion is found in a grant of authority to "determine allocations" ignores

the fact that the plan ***expressly limits*** this authority to a plan provision separate and distinct from the plan provision that contains the partial termination language. ***See*** App. 97, 100. And it is telling that even the Committee does not attempt to defend the Sixth Circuit's reasoning that a provision (§ 16) in the plan that clearly ***limits*** the Committee's discretion "clearly ***grants*** discretion." ***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981, 986 (6th Cir. 1999) (emphasis added), reprinted at App. 9.

Characterizing the Sea Ray plan as establishing a "clear grant of discretion" Committee brief p. 12-13, is inconsistent with ***Kinstler***, not to mention the decisions set forth in the petition on pages 9 to 13. If this plan requires discretionary review, then so will just about any plan language, no matter how ambiguous it may be. Petitioners do not believe this is what the Court intended when it decided ***Firestone***.

There is a sound reason for requiring unambiguous language. As one court observed,

> We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear.

***Bogue v. Ampex Corp.***, 976 F.2d 1319, 1325 (9th Cir. 1992).

Respondents' argument that the petition merely presents an "intensely factual" issue overlooks the fact that the underlying

issue is ***always*** going to be plan language dependent. "Different contractual language justifies different results." ***Carpenter Local 1027 v. Lee Lumber & Building Material Corp.***, 2 F.3d 796, 800 (7th Cir. 1993). Petitioners are not asking this Court merely to "get involved in parsing the language of the Sea Ray Plan." Committee brief p. 14. Rather Petitioners respectfully submit that the Court needs to provide guidance with respect to the clarity of discretionary language in a plan which will insulate a plan administrator's decision from de novo review.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator.

Neither Respondent addresses question 1.B. and 1.C as they were presented in the petition. Instead, like the court of appeals, they re-characterize question 1.B. as whether ***Firestone*** applies to a plan administrator's decision concerning a "question of law."

But Class I has repeatedly argued that even if a court might defer to a plan administrator's "legal conclusions," in so far as

it interprets the terms of the plan, a court should ***never*** defer to a plan administrator's interpretation of a federal statute. If anything, the Committee's brief re-enforces Petitioner's contention that there is a split of authority among the federal courts on this issue. Committee brief p. 15-16.

The window dressing Respondents put on the court of appeals' decision cannot hide the fact that the Sixth Circuit held ***Firestone*** requires a court to defer to a plan administrator's interpretation of a federal statute where the plan incorporates the terms of the statute.[1] The Committee asserts that the Court should not "expend its limited resources reviewing the unexceptionable, fact-specific application of a well-established multi-factor test." Committee brief p. 15. But if this test is so "well-established" why didn't the Committee apply it in reaching its decision? The only factor given serious consideration by the Committee was whether there was "plan abuse." App. 83, 85. While there is no dispute that this is ***one*** of the factors to consider, it was the ***only*** factor given any weight by the Committee. The Committee's chair testified that it did not give significant consideration to the percentage of participants who were excluded from the plan, App. 85, a factor the Sixth Circuit had previously characterized as "significant" and "generally the most persuasive." ***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***, 833 F.2d 74, 79 (6th Cir. 1987); ***see Weil v. Retirement Plan Administrative Committee of The Terson Co., Inc.***, 933 F.2d 106, 110 (2nd Cir. 1991) ("The IRS has informed us that it believes a partial termination may occur if there is 'a significant contraction of a plan, ***such as*** a significant reduction in the number of plan participants' and 'all terminated participants, both vested and non-vested,

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[1] It should also be remembered that a plan must provide for the occurrence of a partial termination in order to obtain favorable tax treatment. 26 U.S.C. § 411(d)(3); 26 U.S.C. §401(a)(7).

should be counted in determining whether a partial termination has occurred.'" (Emphasis added)).

For the two plan years in question (1989-90, 1990-91), participation in the plan dropped from 4,084 to 1,968, i.e., more than 50 percent. App. 38-39. Employment during this period dropped from 4,425 to 2,028, again, a drop of more than half. App. 37-38. The Committee never considered the reason these participants were excluded (i. ., voluntary departures or involuntary layoffs) or why the employment rolls dramatically decreased. Indeed, data regarding constructive discharges was not compiled until after the committee made its decision. App. 67. Few departing employees were replaced and the above figures account for the few replacements that were hired.

Despite the fact that the Committee failed to apply its self-described "well-established multi-factor" test, the Committee's decision was upheld as "reasonable." Even administrative agencies do not have the authority to disregard judicial interpretations of a statute. ***Lechmere Inc. v. NLRB***, 502 U.S. 527, 537 (1992); ***Maislin Industries, U.S. Inc. v. Primary Steel, Inc.***, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.")

Respondents' miscast question 1.C as being whether a court can affirm a plan administrator's decision on "evidence before the Committee." Committee brief p. 19; see also Class II brief p. 24. This misses the point. The question is whether the Committee's stated grounds for its decision were those on which it sought to be affirmed upon judicial review.

Once the Committee commenced this litigation, the Committee persuaded the lower courts to affirm its decision on

grounds which were ***never*** considered or relied upon by the Committee. One such ground was that the termination percentage should be broken down into separate plan years because of the imposition of a federal luxury tax. The Committee now asserts that it was "well aware" of the effect of the luxury tax. Committee brief p. 19. But this fact, even if true, is irrelevant because the chair of the Committee testified that the Committee did ***not*** separate the percentage reductions in the plan by plan year. App. 85.[2]

In its brief, the Committee asserts that it actually considered "figures on terminations as reflected on Sea Ray's Plan Termination Reports . . . ***including*** the reasons for those terminations. Committee brief pp. 5 & 18. The Committee's assertion misstates the record because the "Plan Termination Reports" it claims to have relied upon in 1992 were ***not developed*** until 1995. The Committee, in other words, has again offered a justification that it did not articulate or consider at the time of its decision.

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[2] As if to bolster the Sixth Circuit's decision, the Committee asserts that, even if the plan years were combined, the percentage of involuntarily terminated participants would be "less than 38%." Committee brief p. 20. The Committee baldly asserts that there is a 15-20% average "industry turnover rate." These were not facts relied upon by the Committee or the Sixth Circuit and there is no evidence that Sea Ray's turnover rates were in this range. In fact, there was no genuine "turnover;" few employees who left were replaced. Their departure added to the dimension of the layoff and allowed Sea Ray to reduce its workforce through layoffs and "voluntary departures." App. 67-68. To apply a turnover rate where "voluntarily" departing employees have already been excluded would count non-replaced employees twice, thus inappropriately reducing the percentage of excluded plan participants.

The infirmity of the Sixth Circuit's decision can be summed up by quoting the testimony of the Committee's chair: "It wasn't something that we studied very carefully." App. 84.

In recounting these facts, Petitioners are not asking the Court to reverse the lower courts simply because they drew incorrect conclusions from the facts set before them. What that matters at this stage is whether or not a court should defer to a plan administrators' interpretation of a federal statute. Indeed, should the Court ultimately agree with Petitioners' on this point a remand would be the appropriate course of action.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

Respondents also concede (as they must) that the Sixth Circuit applied the incorrect standard of review. The Committee assets this error was harmless because the district court properly found the Committee's decision (on the constructive discharge issue) was reasonable. What the Committee fails to admit is that it never addressed the constructive discharge issue until after the litigation commenced. Data regarding voluntary/involuntary terminations was not compiled until well after the committee made its decision. App. 67. As has been shown in the discussions about Questions 1.B. and 1.C., the district court did not merely review the Committee's decision but based its decision, in significant part, on grounds never considered, much less relied upon, by the Committee.

## Conclusion

For the reasons herein discussed, petitioners pray that this petition for a writ of certiorari should be granted and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1999 and March 11, 1999.

Respectfully submitted,

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No. 98-1971

# In the Supreme Court of the United States

DANIEL ROBINSON, ET AL., PETITIONERS

*v.*

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP & PROFIT SHARING PLAN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly reviewed a determination by the administrator of an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) that certain reductions in the sponsoring employer's workforce did not result in a partial termination of the plan under 26 U.S.C. 411(d)(3), when the court

   (a) construed the plan terms to grant sufficient discretion to the administrator to trigger an arbitrary and capricious standard of review of the administrator's determination;

   (b) applied an arbitrary and capricious standard to the administrator's determination; and

   (c) considered grounds for the determination on which the administrator had not relied.

2. Whether the court of appeals correctly applied a clearly erroneous standard of review to district court determinations, in granting summary judgment, concerning the number of employees and the time periods to be considered in assessing whether a partial termination occurred.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 1 |
| Discussion | 7 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Allison* v. *Dugan*, 951 F.2d 828 (7th Cir. 1992) | 8 |
| *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) | 17 |
| *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382 1998) | 10, 12 |
| *Block* v. *Pitney Bowes, Inc.*, 952 F.2d 1450 (D.C. Cir. 1992) | 8 |
| *Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062 (6th Cir. 1998) | 14 |
| *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), aff'd in part and rev'd in part on other grounds, 489 U.S. 101 (1989) | 12 |
| *Burrey* v. *Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998) | 12 |
| *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554 (1991) | 10, 12 |
| *DeFelice* v. *American Int'l Life Assur. Co.*, 112 F.3d 61 (2d Cir. 1997) | 15 |
| *Doe* v. *Travelers Ins. Co.*, 167 F.3d 53 (1st Cir. 1999) | 16 |
| *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989) | 4, 7, 11 |
| *Gulf Pension Litigation, In re*, 764 F. Supp. 1149 (S.D. Tex. 1991), aff'd on other grounds, 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995) | 14 |
| *Holt* v. *Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987) | 12 |
| *Hullett* v. *Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107 (3d Cir. 1994) | 8 |

Cases—Continued: Page

*Kearney* v. *Standard Ins. Co.*, 175 F.3d 1084 (9th Cir.), cert. denied, 120 S. Ct. 398 (1999) ..... 8
*Kinstler* v. *First Reliance Standard Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999) ..... 8
*Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994) ..... 9
*Kreis* v. *Charles O. Townley, M.D. & Assocs., P.C.*, 833 F.2d 74 (6th Cir. 1987) ..... 14
*Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176 (3d Cir. 1991) ..... 8
*Lynd* v. *Reliance Standard Life Ins. Co.*, 94 F.3d 979 (5th Cir. 1996) ..... 8
*Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997) ..... 11
*Perry* v. *Simplicity Eng'g*, 900 F.2d 963 (6th Cir. 1990) ..... 15
*Sage* v. *Automation, Inc. Pension Plan and Trust*, 845 F.2d 885 (10th Cir. 1988) ..... 12
*Sisters of the Third Order of St. Francis* v. *Swedish-American Group Health Ben. Trust*, 901 F.2d 1369 (7th Cir. 1990) ..... 8
*Snow* v. *Standard Ins. Co.*, 87 F.3d 327 (9th Cir. 1996) ..... 8, 9
*Spacek* v. *Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998) ..... 12
*Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154 (1984) ..... 13
*Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287 (5th Cir. 1999) ..... 15
*Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045 (1990), vacated in part on other grounds, 933 F.2d 106 (2d Cir. 1991) ..... 12
*Wildbur* v. *ARCO Chem. Co.*, 974 F.2d 631 (5th Cir. 1992) ..... 8

Statutes, regulations and rule: Page

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:
29 U.S.C. 1053(a)(2)(B) ..... 2
29 U.S.C. 1132(a)(1)(B) ..... 7, 11, 15
29 U.S.C. 1133 ..... 15
Internal Revenue Code (26 U.S.C.):
§ 401(a)(7) ..... 2, 10
§ 411(d)(3) ..... 2, 4, 10, 11
26 C.F.R. (1977):
Section 1.411(d)-(2)(b)(1) ..... 4, 10-11, 13
29 C.F.R. (1999):
Section 2560.503-1 ..... 15
Fed. R. Civ. P. 56(c) ..... 17

Miscellaneous:

3 Arthur Linton Corbin, *Corbin on Contracts* (1960) ..... 10
*Internal Revenue Manual*, Plan Terminations (1999) ..... 13-14
Restatement (Second) of Trusts (1959) ..... 10
Rev. Rul. 73-284, 1973-2 C.B. 139 ..... 13
Rev. Rul 81-27, 1981-1 C.B. 228 ..... 13

# In the Supreme Court of the United States

No. 98-1971

DANIEL ROBINSON, ET AL., PETITIONERS

*v.*

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP & PROFIT SHARING PLAN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. The Sea Ray Employees' Stock Ownership & Profit Sharing Plan is an employer-funded, defined-contribution plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and is intended to qualify for favorable tax treatment under the Internal Revenue Code. Pet. App. 3, 22, 96. Under the Plan, employees begin to obtain a non-forfeitable or vested interest in the employer's

contributions after three years of service, and the employees fully vest after seven years of service. *Id.* at 3-4, 23; see 29 U.S.C. 1053(a)(2)(B).

Section 411(d)(3) of the Internal Revenue Code provides that in order for a plan to be qualified for favorable tax treatment, the plan must provide that, upon the plan's "termination or partial termination," "the rights of all affected employees to * * * the amounts credited to the employees' accounts, are non-forfeitable." 26 U.S.C. 411(d)(3); see also 26 U.S.C. 401(a)(7) (plan is not qualified for tax purposes "unless the plan * * * satisfies the requirements of section 411"). Accordingly, the Plan in this case provides that if it is terminated or partially terminated, the accounts of affected employees will become non-forfeitable as of the date of the termination. Pet. App. 4, 21 n.1, 100. The Plan also confers on its administrator, respondent Administrative Committee, all powers necessary to administer the plan, including: "(2) determining the appropriate allocations to Participant Accounts * * *; (3) determining the amount of benefits payable to a Participant (or Beneficiary) * * *; [and] (7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the [Internal Revenue] Code." *Id.* at 7-8, 22, 44, 97-98.

2. Between March 1989 and July 1991, Sea Ray experienced serious declines in its business of selling sports boats, sports cruisers, and yachts. Pet. App. 4, 29, 65. The company laid off a number of employees at various plants from July 1989 through June 1991. *Id.* at 4, 30-39. For the fiscal year of July 1989 through June 1990, plan membership decreased from 3832 employees to 3060 employees. *Id.* at 4, 27-29. After November

1990, when Congress passed a luxury tax on high priced consumer goods, including private boats, sales of Sea Ray's boats further declined. *Id.* at 4-5, 60, 64-65. By the end of the fiscal year of July 1990 through June 1991, plan membership had diminished to 1968 participants, and 12 of the company's 13 plants had either decreased their workforce or closed altogether. *Id.* at 5, 29-30.

In June 1992, respondent Committee met twice to decide whether a partial termination had occurred between 1989 and 1991. Pet. App. 5-6, 24-25, 83-86. The Committee concluded that no partial termination had occurred, reasoning that "there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of Partial Termination." *Id.* at 6.

3. In August 1992, the Committee filed this action in district court seeking a declaratory judgment "that there has not been a partial termination of the Plan within the meaning of the Internal Revenue Code, ERISA and the terms of the Plan." Compl. ¶ 40. The district court conditionally certified two classes of defendants. Pet. App. 89-93. Class I, the petitioners in this case, includes former employee-participants in the Sea Ray plan whose employment ended between July 1989 and June 1991 and who were not fully vested at that time. *Id.* at 90-91. Class II, the Baldock respondents, includes other Sea Ray employee-participants who may be entitled under the Plan's terms to receive benefits forfeited by Class I participants if the Plan was not partially terminated. *Ibid.*

On the parties' cross motions for summary judgment, the magistrate judge recommended granting summary judgment to respondents. Pet. App. 20-88. The judge first rejected petitioners' contention that the court

should review de novo the Committee's decision that there was no partial termination of the Plan. *Id.* at 45. The judge reasoned that under this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a de novo standard of review applies only when the plan does not expressly grant the plan administrator discretion to determine eligibility for benefits or construe plan terms. Pet. App. 41. The judge found that because in this case the "Plan clearly grants the Committee the authority to interpret the term 'partial termination,'" the Committee's determination must be reviewed under an arbitrary and capricious standard. *Id.* at 45.

The judge further stated that, "[a]lthough a reasonableness inquiry is not usually very exacting, the complex nature of this case necessitates a more in-depth analysis of the Committee's decision than that normally required." Pet. App. 46. Accordingly, the judge extensively reviewed the relevant regulations and administrative and judicial decisions construing Section 411(d)(3) of the Internal Revenue Code, which governs plan terminations. *Id.* at 46-57. In particular, the judge observed that 26 C.F.R. 1.411(d)-2(b)(1) provides that "[w]hether or not a partial termination of a qualified plan occurs * * * shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees which have been previously covered by the plan." Pet. App. 46.

The judge then determined that "two separate events" had caused Sea Ray employees to be involuntarily excluded from the plan: a two-year downturn in the small boat industry, and a downturn in the large

boat business caused by the luxury tax that was enacted in November 1990. Pet. App. 60-65. The judge accordingly concluded that he should separately calculate the percentages of plan participants who involuntarily left the Plan because of the layoffs for each of the two fiscal years involved, 1989-1990 and 1990-1991. *Id.* at 65.

The judge also rejected petitioners' assertion that he should include in his calculation of the percentages of participants who involuntarily left the Plan those employees who resigned from Sea Ray during the relevant time, on the theory that they were constructively discharged due to the economic downturn. The judge explained that a constructive discharge occurs "only when a reasonable person would find [working] conditions intolerable," Pet. App. 72 (internal quotation marks omitted), and that "[a]lthough it is probable that the economic conditions at Sea Ray were a factor in some, if not most, of the cases of employees leaving early, such consideration does not make the choice to leave involuntary," *id.* at 75. The judge therefore concluded that there was "insufficient evidence" to demonstrate that employees who claimed to have resigned in anticipation of layoffs were constructively discharged. *Ibid.* Based on those conclusions, the judge found that the percentage of participants involuntarily excluded from the Plan due to the economic downturn and luxury tax was 15.9% in 1989-1990; 27.9% in 1990-1991; and 36.7% for the entire two-year period. *Id.* at 80-82.

The judge also observed that, "generally, a percentage above 50 percent will be determinative of the occurrence of a partial termination"; "figures below 20 percent will only be significant if there is evidence of egregious abuse"; and "[p]ercentages between 20 percent and 50 percent will be significant only if combined

with other factors." Pet. App. 76-77. The judge noted that in this case there was no suggestion that the layoffs impaired the Plan financially or that Sea Ray had improper or abusive motives in terminating employees.[1] *Id.* at 82-83. The judge concluded that the Committee's determination that there had not been a partial termination "was not arbitrary and capricious," but instead "was a reasonable interpretation of the Plan and of the cases and regulations concerning partial termination." *Id.* at 87.

The district court adopted the magistrate judge's recommendation. Pet. App. 17-19.

4. The court of appeals affirmed. Pet. App. 1-15. The court of appeals stated that its review of the district court's order granting summary judgment was de novo and that the court would draw all reasonable inferences in favor of the nonmoving party. *Id.* at 7. The court of appeals then determined that it would apply the arbitrary and capricious standard of review to the Committee's decision because the plan "clearly grants discretion to the Committee," and this discretion includes interpreting the plan term "partial termination." *Id.* at 9.

On the merits, the court of appeals rejected petitioners' contentions that the layoffs at Sea Ray "should be considered as one event" and that "former employees who left in anticipation of an involuntary layoff should count as constructive discharges." Pet. App. 12. The court saw "no occasion to disturb" what it termed "the factual findings of the district court." *Ibid.* The

[1] The judge observed that an employer can abuse the plan or demonstrate bad faith by excluding participants to effect a reversion of contributions to the employer or to decrease the employer's contribution obligations to the plan. Pet. App. 83.

court of appeals explained that it "agree[d] that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent factors." *Id.* at 12-13. The court of appeals further reasoned that, although "some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work." *Id.* at 13. The court of appeals concluded that, "[g]iven [the Committee's] calculation of the percentage of terminations – both years were below 30 percent – and the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated." *Id.* at 15.

**DISCUSSION**

1. Petitioners argue (Pet. 9-21) that this Court should grant certiorari to consider (a) whether the Plan grants the Committee discretion to determine whether the Plan was partially terminated; (b) whether a *de novo* standard of review applies to the question of whether a partial termination occurred; and (c) whether the court of appeals improperly upheld the Committee's decision on grounds the Committee had not considered. None of those issues warrants this Court's review in the circumstances of this case.

a. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), this Court held "that a denial of benefits challenged under [29 U.S.C.] 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Courts of appeals generally have concluded that the *de novo* standard applies

unless the plan clearly or expressly grants discretion, see, *e.g.*, *Lynd* v. *Reliance Standard Life Ins. Co.*, 94 F.3d 979, 981 (5th Cir. 1996); *Allison* v. *Dugan*, 951 F.2d 828, 832 (7th Cir. 1992); Pet. 9-10, although they have also recognized "that magic words (such as 'the committee has discretion to * * *') are unnecessary" to confer discretion. *Sisters of the Third Order of St. Francis* v. *SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990); see also, *e.g.*, *Kinstler* v. *First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999); *Wildbur* v. *ARCO Chem. Co.*, 974 F.2d 631, 636-637 (5th Cir. 1992); *Block* v. *Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) (R. Ginsburg, J.).

Petitioners argue (Pet. 10) that those decisions conflict with *Hullett* v. *Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 114 (3d Cir. 1994), in which the Third Circuit stated that "[d]iscretionary powers need not be expressly granted; they may be implied by the plan's terms." That principle appears, however, merely to be another way of stating that the plan need not contain "magic words," such as "discretion is granted." See *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1180 (3d Cir. 1991) ("no 'magic words,' such as "discretion is granted . . . [,] need be expressly stated") (internal quotation marks omitted).[2] In any event, even assuming a conflict on that issue existed, the decision below applies the more stringent

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[2] Petitioners' reliance (Pet. 10) on *Snow* v. *Standard Insurance Co.*, 87 F.3d 327, 330 (9th Cir. 1996), is misplaced. *Snow* has been overruled by *Kearney* v. *Standard Insurance Co.*, 175 F.3d 1084, 1090 (9th Cir.) (en banc), cert. denied, 120 S. Ct. 398 (1999), in which the Ninth Circuit held that the administrator did not "unambiguously retain[]" discretion in plan language requiring "satisfactory proof" of disability. See also note 3, *infra*.

standard urged by petitioners. See Pet. App. 9 ("a plain reading of the [Sea Ray] Plan reveals that it clearly grants discretion to the Committee"). The court of appeals' fact-bound interpretation of the Plan language in this case therefore does not warrant further review.[3]

b. Petitioners also argue (Pet. 14-15) that the court of appeals erred in applying a deferential standard of review to the Committee's determination of whether a partial termination occurred. Although we agree with petitioners on this point, the issue does not merit this Court's review because, in our view, the Committee's determination was correct, even when viewed under a de novo standard of review.

i. Section 19 of the Plan provides that, "[i]f the Plan is terminated (or partially terminated)," employees im-

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[3] Contrary to petitioners' argument (Pet. 11-13), the decision below does not conflict with *Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994). In *Kirwan*, the court of appeals held that plan provisions giving a fiduciary "authority to control and manage the operation and administration of the Plan," and authority to "promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan," did not grant discretionary authority to determine whether the participant was eligible for benefits, especially when the fiduciary had not promulgated any rules or regulations. *Id.* at 788-789. *Kirwan* therefore did not decide the question presented here, *i.e.*, whether plan language allowing a fiduciary to construe and interpret plan terms gives the fiduciary discretion to construe the plan term "partial termination."

Petitioners also argue (Pet. 10-11 & n.3; Reply Br. 1-4) that the courts of appeals are divided on whether a plan administrator's authority to require "satisfactory" proof of entitlement to benefits confers discretionary authority. Similar language is not at issue here, however, and this Court recently denied review in *Standard Insurance Co.*, see note 2, *supra*, a case involving such language.

mediately vest in their accounts. Pet. App. 100. That provision was required by Section 411(d)(3) of the Internal Revenue Code in order for the Plan to receive favorable tax treatment. 26 U.S.C. 401(a)(7) and 411(d)(3); see also Comm. Br. in Opp. 3 ("Section 19 was included in the Plan in order to assure its favorable tax treatment."). Thus, when the Committee became concerned whether the significant number of layoffs had caused a partial termination, the Committee sought a judicial declaration that there was no partial termination under the Code. Compl. ¶ 40. In that situation, a court should accord no particular weight to the Committee's judgment on the issue. Rather, when a contract includes a provision required by statute, "the provision must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it." 3 Arthur Linton Corbin, *Corbin on Contracts* § 551, at 200-201 (1960); see also *Restatement (Second) of Trusts* § 187 cmt. a (1959) ("The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or *by the principles of law applicable to the duties of trustees.*") (emphasis added).

Similarly, a rule that deferred to a plan administrator's interpretation of the Internal Revenue Code would be inconsistent with the requirement that substantial deference be accorded to the Commissioner's reasonable interpretation of the Code. See, *e.g.*, *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 389-390 (1998); *Cottage Savs. Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). Here, the Department of the Treasury has promulgated specific regulations that provide that "[w]hether or not a partial termination of a qualified plan occurs * * * *shall be determined by the Commissioner* with regard to all the facts and cir-

cumstances in a particular case." 26 C.F.R. 1.411(d)-2(b)(1) (emphasis added). Thus, where a plan includes a partial termination provision to comply with the Internal Revenue Code, and the regulations implementing the relevant provision of the Code charge the Commissioner with the responsibility for determining when a partial termination occurs, there is no basis for deferring to the plan administrator's unilateral judgment on the issue. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 138 n.9 (1997) (explaining that principles of deference do not extend to administrative agencies that are not charged with administering the statute at issue).[4]

Indeed, a contrary rule, under which a court must accept any "reasonable" determination of the administrator whether a partial termination occurred under 26 U.S.C. 411(d)(3), would be unworkable. A judicial decision deferring to the administrator is not binding on the IRS if it is not a party to the suit. See Pet. App. 25 (noting Committee's recognition that "[a] court's determination as to whether a partial termination has occurred * * * would not be binding on the IRS unless the IRS had voluntarily joined the suit or the suit was an appeal of a final [decision] by the IRS."). Similarly, in any later litigation between the plan administrator and the IRS on the matter, a court would be required to

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[4] For the reasons stated in the text, this case is distinguishable from *Firestone*, which involved judicial review under 29 U.S.C. 1132(a)(1)(B) of a fiduciary's denial of a claim for benefits submitted to it in the ordinary course of plan administration. Here, respondent Committee unilaterally determined that the Sea Ray Plan had not partially terminated for purposes of Section 411(d)(3) of the Internal Revenue Code, and the Committee thereafter filed a declaratory judgment action to obtain court approval of its decision.

defer to the IRS's determination, as long as the agency's decision was reasonable, see *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. at 389-390; *Cottage Savs. Ass'n* v. *Commissioner*, 499 U.S. at 560-561, with no deference owed to any contrary conclusion reached by the plan administrator.

ii. As petitioners explain (Pet. 14-15), the court of appeals' adoption of a deferential standard of review conflicts with the decisions of other courts of appeals, which have reviewed de novo a plan administrator's determination whether a partial termination occurred. See *Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1048-1049 (2d Cir. 1990), vacated in part on other grounds, 933 F.2d 106 (2d Cir. 1991); *Sage* v. *Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134, 148-149 (3d Cir. 1987), aff'd in part and rev'd in part on other grounds, 489 U.S. 101 (1989); see also Pet. App. 10 (declining to adopt contrary decisions of other courts of appeals). That conflict may well warrant review of the proper standard of review of such determinations in an appropriate case.[5] We do not believe that review is warranted in this case, however,

[5] Respondents do not dispute that the court of appeals' decision conflicts with other appellate decisions, but they dismiss those decisions as "aberrational." Comm. Br. in Opp. 16; see also Baldock Br. in Opp. 21. Those decisions, however, comport with decisions of other courts of appeals on similar issues of statutory interpretation. See, *e.g.*, *Burrey* v. *Pacific Gas & Elec. Co.*, 159 F.3d 388, 391-392 (9th Cir. 1998) (meaning of plan that incorporates Code's definition of "leased employees" is a question of law reviewed de novo); *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 288 (5th Cir. 1998) (no deference owed to plan administrator's statutory interpretation); *Holt* v. *Winpisinger*, 811 F.2d 1532, 1536 (D.C. Cir. 1987) (whether individual is "employee" involves interpretation of ERISA and is therefore reviewed de novo).

because, in our view, the Committee correctly determined that no partial termination occurred, whether the Committee's determination is reviewed de novo or under an arbitrary and capricious standard of review.

Whether or not a partial termination has occurred depends on "all the facts and circumstances in a particular case." 26 C.F.R. 1.411(d)-2(b)(1). One significant factor is the percentage of plan participants dismissed in connection with a major corporate event. Pet. App. 76 (collecting cases). In this case, the percentage of participants involuntarily excluded from the Plan due to the economic downturn was 15.9% in 1989-1990, and due to the economic downturn and the luxury tax was 27.9% in 1990-1991. The total for the entire two-year period was 36.7%. *Id.* at 80-82. Those percentages, including the total over the two years, are generally below those that the Service has recognized as sufficient in themselves to constitute a partial termination, in the absence of any improper purpose, potential for abuse, or other relevant factors. See, *e.g.*, Rev. Rul. 81-27, 1981-1 C.B. 228 (58% reduction resulting from winding up of part of employer's business); Rev. Rul. 73-284, 1973-2 C.B. 139 (80% reduction resulting from change of business location); see also *Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154, 160 (1984) (34% and 51% reduction in two successive plan years from adverse business conditions); see generally *Internal Revenue Manual*, Plan Terminations 7.7.2, at 12 (Apr. 20, 1999) ("There is no fixed turnover rate which determines whether a partial termination occurred, but the rate must be substantial.").

In addition, a partial termination may be indicated by the presence of an increased "potential for reversion" to the employer or "[t]he possibility for prohibited discrimination" as a result of the workforce reduction.

*Internal Revenue Manual*, Plan Termination, 7.7.2, at 13. Here, there are no allegations that the layoffs financially impaired the Plan, that the layoffs were designed to effect a reversion to the employer, or that the employer was otherwise motivated by an improper purpose. Pet. App. 82-83; cf. *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1170 (S.D. Tex. 1991) (noting "the increased potential for a reversion because of [employee] terminations, which occurred in an atmosphere in which Chevron was considering how to revert surplus Gulf Plan assets for its general corporate use"), aff'd on other grounds, 36 F.3d 1308, 1314 n.11 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995). In these circumstances, we do not believe that the Committee's determination that the Plan had not partially terminated was erroneous, even when viewed de novo.

Indeed, despite their professions of deference, it appears that the courts below actually reviewed the Committee's determination to ensure that it complied with the Code and the IRS and judicial interpretations of the Code. See Pet. App. 10-12, 46-57, 62-64, 66-67, 70-71, 76-79; see also Pet. App. 98 (Committee required under Plan to interpret terms "consistent with the terms of * * * the Code"); compare *Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066 (6th Cir. 1998) (debate over use of de novo or arbitrary and capricious standard is "somewhat academic" because plan required administrator to interpret plan consistent with intent that plan be qualified under Code); *Kreis* v. *Charles O. Townley, M.D. & Assocs., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). Thus, despite the court of appeals' articulation of a deferential standard of review, it does not appear that the decision below departs significantly as a practical matter from other appellate decisions that have considered the partial termination issue based on

the Internal Revenue Code. Accordingly, we do not believe that the standard of review of partial termination determinations warrants certiorari in the context of this case.

c. Petitioners argue (Pet. 20) that the court of appeals erred in relying on the percentage reduction in Sea Ray's workforce over two separate years when the Committee actually considered the percentage reduction over "[t]he total two year period." Pet. App. 85. Petitioners further argue (Pet. 18-20) that the courts of appeals are divided on whether a plan administrator's decision can be upheld under a de novo standard of review on grounds not relied upon by the administrator. Those contentions, however, do not warrant this Court's review.

The courts of appeals have reached "varied results" in determining whether a suit under 29 U.S.C. 1132(a)(1)(B) to challenge a plan administrator's denial of benefits should be decided solely on the record before the plan administrator. See *DeFelice* v. *American Int'l Life Assurance Co.*, 112 F.3d 61, 65 (2d Cir. 1997) (discussing decisions from other courts of appeals). That arguable conflict, however, is irrelevant here. Those courts of appeals that have limited the record under review to matters before the plan administrator have reasoned that parties should not circumvent the claims review procedure that ERISA requires plans to provide for the denial of benefits. See 29 U.S.C. 1133; 29 C.F.R. 2560.503-1; see, *e.g.*, *Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287, 300 (5th Cir. 1999) (en banc); *Perry* v. *Simplicity Eng'g*, 900 F.2d 963, 967 (6th Cir. 1990). That rationale does not apply to this case, because respondent Committee never considered a claim for benefits; the Act does not require that plans provide a procedure for determining whether a partial

termination has occurred; and the participants who would be harmed by the Committee's no-partial-termination decision in this case did not have an opportunity to create an adequate record for review. Rather, the Committee unilaterally decided that no partial termination had occurred based on a record that the Committee alone developed. Pet. App. 24-25, 83-87.

There accordingly was no reason for the courts below to limit themselves to the record compiled by the Committee. Applying proper legal standards, the district court was free to decide the issue on any ground supported by the record before that court, and the court of appeals properly reviewed the case on the basis of that record. See *Doe* v. *Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999) ("It is not clear that any single answer [on what the record under review should be] covers all of the variations in ERISA cases; the 'record' may depend on what has been decided, by whom, based on what kind of information, and also the standard of review and the relief sought."). Further review of this issue is therefore not warranted.[6]

2. Petitioners argue (Pet. 21-27) that the court of appeals improperly applied a clearly erroneous standard of review to issues the district court resolved on summary judgment. Although we agree that the court of appeals misstated the applicable standard of review, it does not appear that any error on this issue was outcome-determinative. For that reason, and because the proper standard of review is already clearly

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[6] For similar reasons, the conflict asserted by petitioners (Pet. 16-17) concerning whether a court must defer to a plan administrator's factual findings in benefit-denial suits is inapposite to this case, because the Committee did not establish any mechanism that permitted petitioners to develop a factual record.

established, further review on this question is not warranted.

On appeal from the district court's grant of summary judgment, the court of appeals stated that it "draws all reasonable inferences in favor of the non-moving party" (Pet. App. 7), but that it saw "no occasion to disturb the factual findings of the district court" with respect to whether one or two events caused Sea Ray's layoffs and whether employees who left in anticipation of layoffs should be viewed as constructively discharged, *id.* at 12. See also *id.* at 14 ("Finding no clear error by the district court, we also adopt the percentages [of reductions] generated by Class II."). The court of appeals' purported adoption of factual findings by the district court is inconsistent with the principle that a district court on summary judgment may not resolve factual disputes on a material issue of fact. Fed. R. Civ. P. 56(c); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

We do not think, however, that the court of appeals' remarks affected its ultimate legal conclusion that no partial termination had occurred. The court of appeals also accepted petitioners' version of the facts and held that those facts did not amount to a constructive discharge of employees who voluntarily left Sea Ray. Thus, the court of appeals stated:

> [W]hile we do not dispute that some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work. The record does not reflect that working conditions at Sea Ray were so difficult or unpleasant that a reasonable person in

> the employee's shoes would have felt compelled to resign.

Pet. App. 13 (citations and internal quotations marks omitted). Petitioners do not assert that they were constructively discharged as the court defined that term, or that the court of appeals' definition conflicts with the decision of any other court of appeals. Rather, petitioners complain (Pet. 25-26) that the court of appeals should not have applied that constructive discharge standard in determining which participants who voluntarily left the company should be counted in the reduction of participants under the partial termination test. Because there is no circuit conflict on that issue, further review is not warranted.

Petitioners similarly were not prejudiced by the court of appeals' suggestion that it deferred to the district court's factual finding that two distinct events caused the layoffs at Sea Ray. Pet. App. 13. The court of appeals held that it too "agree[d] that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent factors." *Id.* at 12-13. Petitioners do not dispute that two separate events occurred or that dire consequences followed from each; instead, they argue (Pet. 25) that the court of appeals "ignored" their argument that the luxury tax did not justify treating all workforce reductions in the second plan year as attributable to the luxury tax, when some of the layoffs occurred before enactment of the luxury tax and other layoffs occurred at plants manufacturing boats not subject to the tax. That fact-bound contention, however, does not warrant this Court's attention, especially because the facts and circumstances in this case do not establish the existence of a partial termina-

tion, even if the two plan years are considered together. See pp. 13-14, *supra*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1999

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No. 98-1971

In The

# Supreme Court of the United States

DANIEL ROBINSON, ET AL.,

*Petitioners,*

v.

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEE'S STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,

*Repondents,*

and

SHARON BALDOCK, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS SHARON BALDOCK, ET AL.

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## QUESTION PRESENTED

Whether the Magistrate Judge, district court, and Sixth Circuit properly determined, on the basis of well-settled law and uncontested facts established through the parties' cross-motions for summary judgment, that respondents' determination that no partial termination of the Plan had occurred was not arbitrary and capricious but reasonable and correct.

## RULE 29.6 STATEMENT

Respondents are not corporations. Respondents are present and former Sea Ray employees who are or were participants in the Sea Ray Employees Stock Ownership and Profit Sharing Plan.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

RULE 29.6 STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

STATEMENT ..... 1

1. THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN ..... 2

2. RECENT HISTORY OF PLAN AND THE SPONSORING EMPLOYER ..... 5

3. ADMINISTRATIVE DETERMINATIONS OF PLAN COMMITTEE ..... 8

4. PROCEEDINGS OF THE LOWER COURTS ... 9

REASONS FOR DENYING THE PETITION ..... 13

I. THE SIXTH CIRCUIT AND THE DISTRICT COURT PROPERLY APPLIED THE STANDARDS OF *FIRESTONE TIRE & RUBBER CO. V. BRUCH* ..... 14

II. DID THE COURT OF APPEALS PROPERLY APPLY THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THOSE CONCLUSIONS CRUCIAL TO THE HOLDING OF THE DISTRICT COURT ..... 25

III. CONCLUSION ..... 30

## TABLE OF AUTHORITIES

Page

CASES CITED:

*Anderson v. Great West Life Assurance Co.*, 942 F.2d 392 (6th Cir. 1991) ..... 17, 18, 19

*Baxter By and Through Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989) ..... 15

*Cathey v. Dow Chem. Co. Med. Care Program*, 907 F.2d 554 (5th Cir. 1990) ..... 15

*Collignon v. Reporting Serv. Co.*, 796 F. Supp. 1136 (C.D. Ill. 1992) ..... 28

*Davis v. Kentucky Fin. Co. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989) ..... 20, 24, 25

*Firestone Tire & Rubber Co. v. Burch*, 489 U.S. 101 (1989) ..... 1, 10, 14, 16, 19, 20

*Gauer v. Connors*, 953 F.2d 97 (4th Cir. 1991) ..... 22

*Halliburton Co. v. CIR*, 100 T.C. 216 (1993), *aff'd*, 25 F.3d 1043 (5th Cir. 1993) ..... 27, 28

*In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991, *aff'd sub nom., Borst Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. den.*, 514 U.S. 1066 (1995) ..... 26, 27

*Jordan v. Retirement Committee of Rensselaer Polytechnic Institute*, 46 F.3d 1264 (2nd Cir. 1995) ..... 21

*Kearney v. Standard Ins. Co.*, ___ F.3d ___, Nos. 96-16539, 96-16701, 1999 WL 246485 (9th Cir. 1999) ..... 17

*Kirwan v. Marriot Corp.*, 10 F.3d 784 (11th Cir. 1994) ..... 16

*Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987) ..... 25, 26, 29

TABLE OF AUTHORITIES – Continued

Page

*Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990) .... 28

*Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989) ..... 15

*Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096 (5th Cir. 1990) ..... 21

*Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (en banc) ..... 15, 17

*Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651 (10th Cir. 1990) .... 21

*Tipton & Kalmback, Inc.*, 83 T.C. 154 (1984) ..... 26

*Weil v. Retirement Plan Admin. Comm'n*, 913 F.2d 1045 (2nd Cir. 1990), *rehearing*, 933 F.2d 106 (2nd Cir. 1991) ..... 21

*Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368 (6th Cir. 1994) ..... 18

STATUTES CITED:

20 U.S.C. §§ 1002(3), (34) ..... 2

26 U.S.C. § 401 et seq. ..... 2, 18

26 U.S.C. § 402 ..... 3

26 U.S.C. § 411 ..... 3

26 U.S.C. § 411(d)(3) ..... 4, 5, 19

29 U.S.C. § 1001-1461 ..... 5

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS CITED:

Treas. Reg. § 1.411 ..... 3

Treas. Reg. § 1.411 (d)-2(b) ..... 20

Treas. Reg. § 1.411 (d)-2(b)(1) ..... 28

## STATEMENT

This action was initiated by Respondents, the Administrative Committee (the "Committee") of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Plan") and individually the members of said Committee, William J. Barrington, Diane M. Yaconetti, and William R. McManaman, by the filing of a class action complaint for declaratory judgment in the United States District Court for the Eastern District of Tennessee Northern Division. The primary issue involved a determination as to whether the Committee was correct in its prior finding that a partial termination of the Plan had not occurred during Plan fiscal years 1989 and 1990 as a result of a significant reduction in the workforce of the sponsoring employer and the resulting reduction in the number of participants in the Plan. Following the filing of cross-motions for summary judgment by the parties the district court adopted the extensive and comprehensive report of the Magistrate Judge and entered a finding that a partial termination had not occurred. Substantial deference was given to the determination of the Committee pursuant to the arbitrary and capricious standard of review applied by the district court under the standards of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). A panel of the Sixth Circuit Court of Appeals unanimously affirmed the lower court's decision by finding that the proper standard of review had been applied. A subsequent request for en banc hearing was denied. This Court is now asked to reverse the consistent and comprehensive findings of the lower courts. Such action is not justified.

It should be here noted that Respondent Class II has a similarity of interest with Respondent Committee. As a

result Class II is familiar with the brief filed on behalf of the Committee and in this response brief may make reference to the appendices contained therein.

### 1. The Sea Ray Employees' Stock Ownership and Profit Sharing Plan

The Plan is a combination Employee Stock Ownership Plan ("ESOP") and Profit Sharing Plan qualified under the Employee Retirement Income Security Act ("ERISA"), 20 U.S.C. §§ 1002(3), (34) and the Internal Revenue Code (the "Code"), 26 U.S.C. § 401 et seq. As a result of such qualification the sponsoring employer, Ray Industries, Inc. ("Sea Ray"), may make annual contributions to the Plan on behalf of its participating employees and deduct those contributions as salary expense for federal income tax purposes. Employees are not permitted to make elective deferrals of salary or compensation into the Plan. All contributions are invested in either qualifying employer securities (typically stock of the sponsoring employer or its parent company) or diversified investments. Pet. App. 3, 22.

An employee becomes a participant in the Plan after one year of service with the sponsoring employer. Each participant has an individual account that receives allocations of the annual contributions based upon a formula contained in the Plan. Due to the qualified status of the Plan under ERISA and the Code the employees are not required to recognize income on these contributions until the assets are distributed outright to the employee upon termination of service with the sponsoring employer. Pet. App. 3-4. The accounts are maintained in a trust which is

a tax-exempt entity under the Code. As a result any income generated by the assets of the trust is not taxed until distribution of the account to the individual plan participant. 26 U.S.C. § 402. No additional benefits are provided to the participants under the Plan. Upon termination of employment with the sponsoring employer a participant is entitled only to the distribution of his/her account. Pet. App. 3.

Participants are not automatically entitled to the entire balance of their account upon termination of employment. The Plan employs the following incremental vesting schedule as permitted under the Code:

| Years of Service | Vested Percentage |
|---|---|
| Less than 3 years | 0% |
| 3 years | 20% |
| 4 years | 40% |
| 5 years | 60% |
| 6 years | 80% |
| 7 or more years | 100% |

Plan § 10; Pet. App. 3-4; 26 U.S.C. § 411; Treas. Reg. § 1.411.

If a participant terminates service with the sponsoring employer prior to the completion of seven years of service with the company, the nonvested portion of the participant's account is forfeited and reallocated among the remaining participants in the Plan. Plan §§ 6, 10; C.A. App. 52, 60; Pet. App. 4, 23.

Pursuant to the qualification requirements of the Code, the Plan contains a provision addressing the effect of a partial termination of the Plan. In such case each participant would immediately become 100% vested in

his/her individual account balance regardless of the years of service rendered to that date. 26 U.S.C. § 411(d)(3), Plan § 19, Pet. App. 4, 100.

The Plan is administered by the Committee which is given a broad grant of administrative authority. In particular, Section 16(c) of the Plan provides:

> The Committee shall have all powers necessary to enable it to administer the Plan . . . including without limitation the following:
>
> (1) resolving all questions relating to the eligibility of Employees to become Participants;
>
> (2) determining the appropriate allocations to Participants' Accounts . . . ;
>
> (3) determining the amount of benefits payable to a Participant . . . , and the time and manner such benefits are to be paid;
>
> (7) construing and interpreting the Plan . . . and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code. . . .

Plan § 16(c).

The Committee has consistently consulted with legal counsel to insure that all issues are properly and adequately addressed and to determine the full scope of its authority and discretion. Pet. App. 84-86.

The Plan is on a July 1 to June 30 fiscal year.

Section 19 of the Plan provides that if "the Plan is terminated (or partially terminated) . . . the Accounts of

Employees affected by the termination will become non-forfeitable as of the date of termination. . . . " This provision is required pursuant to the Code and to ERISA for qualification as a tax-exempt trust and plan. Pet. App. 100; 26 U.S.C. § 411(d)(3); 29 U.S.C. §§ 1001-1461.

### 2. Recent History of Plan and the Sponsoring Employer.

Sea Ray is a manufacturer and marketer of fiberglass recreational boating craft producing a full line of product from sport boats to luxury motor yachts. The recreational nature of the product line results in consumer decisions that are highly discretionary in nature and sensitive to overall economic conditions. There are no other product lines and no manufacturing capability in areas other than boat manufacturing. Pet. App. 3, 28; C.A. App. 871.

During the 1980's the boating industry in the United States experienced an unprecedented growth cycle. From 1983 to 1986 annual sales grew at an average rate of 35% per annum. This was reflected in Sea Ray's own sales performance. Pet. App. 27. This growth accelerated even further in 1987 and 1988. However, in calendar year 1989 Sea Ray noticed a small drop in total sales followed by a major and significant reduction in sales during calendar years 1990 and 1991.

| Year | Units Sold |
|---|---|
| 1985 | 12,456 |
| 1986 | 15,916 |
| 1987 | 22,355 |
| 1988 | 24,538 |
| 1989 | 23,214 |
| 1990 | 14,343 |
| 1991 | 10,542 |

Pet. App. 30.

The number of participants in the Plan naturally followed the sales of the company as the workforce was increased to meet the higher production requirements of the mid to late 1980's. At the beginning of the growth cycle Sea Ray was operating production facilities at seven locations. By July 1, 1989 the company had thirteen manufacturing facilities in operation. On July 1, 1985 there were 1,501 participants in the Plan. Pet. App. 27. By July 1, 1989 there were 3,832 plan participants. *Id.* at 27.

The drop in sales affected the entire product line except for the luxury motor yachts, the sales of which initially remained stable. However, in 1990 a federal "luxury tax" was implemented which was designed to be applied based upon the price and character of certain consumer products. The luxury motor yachts were within the price range characterizing these consumer products and therefore were subject to the tax. This tax had an immediate effect upon sales in this product line resulting in decreased sales and production of these items. *Id.* at 4-5, 29, 65.

The drop in sales resulted in a reduction of production and a corresponding decrease in employees and Plan participants. An initial reduction was implemented in

March and April of 1989. Sea Ray initially attempted to minimize the layoffs and stabilize the workforce, however, as sales figures for July, August and September were analyzed additional layoffs were deemed necessary and were announced in November 1989. One plant was closed and operations were consolidated and streamlined at other plants. The reduction in workforce was reflected in the December 1989 and January 1990 employment statistics. *Id.* at 31-34.

Employment was stabilized from February through June of 1990 when the number of plan participants stood at 3,060. Complt. ¶ 52, Pet. App. 29. The total number of plan participants for fiscal year 1990 was 4,084 computed by reference to the number of participants as of the beginning of the fiscal year (July 1, 1989), 3,832, plus the number of participants added during the year, 252. Pet. App. 38-39.

As a reaction to the continued slump in sales and projected orders from dealers, terminations were once again initiated in July, 1990 and continued on a periodic basis though the remainder of calendar year 1990 with the closing of two additional facilities. Pet. App. 34-37.

In the later portions of calendar year 1990 Congress passed and the President signed into law the aforementioned luxury tax. As of the beginning of the 1991 fiscal year (July 1, 1990) the Merritt Island, Florida and Palm Coast, Florida manufacturing facilities had among their employees 841 plan participants, only 30 fewer participants than were in the Plan on June 30, 1989. However, on June 30, 1991 these two facilities had only 538 plan participants remaining. Pet. App. 38. A disproportionate

percentage of the workforce reduction at these facilities occurred in fiscal year 1991. This corresponded to the passage and implementation of the luxury tax.

The total number of participants during fiscal year 1991 was 3,111 computed by reference to the number of participants as of the beginning of the fiscal year (July 1, 1990), 3,060, plus the number of participants added during the year, 51. Pet. App. 39. As of June 30, 1991, the end of the time frame here in question, the number of plan participants had declined to 1,968. Complt. ¶ 53; Pet. App. 29-30. For the two year time frame July 1, 1989 through June 30, 1991 the total number of plan participants had declined from 4,139 to 1,968. *Id.*

### 3. Administrative Determinations of Plan Committee.

As a result of the reductions in plan participation associated with the contraction of the sponsoring employer's workforce, the Committee initiated a review of the status of the Plan pursuant to the authority granted the Committee under Section 16 of the Plan. The primary purpose of these deliberations was to determine if a partial termination of the Plan had occurred. Pet. App. 84-86. The review of the Committee extended over two separate meetings in June 1992 during which the Committee sought the advice of legal counsel to insure that a full and complete evaluation was performed. *Id.* A number of factors were taken into account by the Committee including the percentage of participants terminated, the causative events triggering the reduction in force, and the absence of any financial benefit to the

sponsoring employer. *Id.* As a result of these deliberations the Committee determined that a partial termination of the Plan had not taken place.

**4. Proceedings of the Lower Courts.**

The Committee initiated this action by the filing of a complaint for declaratory judgment in the United States Federal Court for the Eastern District of Tennessee Northern Division. In that complaint the Committee asserted the existence of two separate classes of defendants and asked the court to certify each class. Under order of said court dated April 13, 1993 the two classes were defined as follows:

> Class I: All former Sea-Ray employees who were participants in the Plan and whose service as employees ended between July 1, 1989 and June 30, 1991, and who had an interest in the plan that was not fully vested, as well as the beneficiaries of those former Sea-Ray employees; and
>
> Class II: All present and former Sea-Ray employees who are or were participants in the plan and who may be entitled under the terms of the plan to receive a portion of the forfeitures resulting from the termination of employment of members of Class I, as well as the beneficiaries of those present and former Sea-Ray employees.

Pet App. 21-22.

The Committee seeks a declaration (i) that a partial termination of the Plan has not occurred as the result of the loss of plan participants; (ii) that the members of Class I are not therefore entitled to the accelerated vesting of their previously nonvested account balances; and (iii) that the nonvested balances of the members of Class I are to be deemed forfeited upon their termination of employment and such balances are to be reallocated to the continuing participants of the Plan pursuant to the provisions of the Plan.

Class I is the petitioner in this action. Class II and the Committee are the co-respondents. Following limited discovery, as agreed in informal pre-trial conference, the parties filed cross-motions for summary judgment. Said motions and subsequent oral arguments were heard by United States Magistrate Judge Thomas S. Phillips pursuant to order of reference entered by the district court. Pet. App. 20. The Magistrate Judge issued an exhaustive and comprehensive 79 page report which recommended to the district court that the summary judgment motions of the Committee and Class II be granted and that the motion of Class I be denied. *Id.* at 19, 88.

In the first step of his review the Magistrate Judge set forth the appropriate standard of review of the Committee's action. Citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) the Magistrate Judge determined that the findings of the Committee would not be disturbed unless it was determined that they had been arbitrary and capricious. In applying the *Bruch* standard the Magistrate Judge found that Section 16(c) of the Plan gave the Committee the discretion and authority to construe and interpret the Plan and to determine the benefits payable to the

Plan participants. The Magistrate Judge reasoned that such authority logically extends to the determination of whether a partial termination has taken place pursuant to Section 19 of the Plan. Pet. App. 44-45. As a result of the discretion granted to the Committee in determining the occurrence or nonoccurrence of a partial termination the arbitrary and capricious standard was found to be appropriate. *Id.*

Upon setting the standard of review the Magistrate Judge proceeded in a review and analysis of the facts and circumstances surrounding the constriction of the Plan and the application of these factors to the standard of law. In doing so reference was made to both regulatory and judicial authority including administrative and regulatory rulings issued by the Internal Revenue Service, internal guidance provided by the Service to its agents, and case law originating from both within and outside of the Sixth Circuit. *Id.* at 47-79.

There were two areas of significant controversy which were resolved by the Magistrate Judge in making his decision. The first involved whether multiple triggering events had occurred which justified dividing the two plan years constituting the 1989-1991 time frame into two separate testing periods. The second involved the question as to whether all terminations (voluntary, involuntary, retirement, disability and termination for cause) should be used in computing the percentage of plan participants terminated in relation to the triggering events. *Id.*

The Magistrate Judge concluded that there were in fact two separate triggering events (referred to as "corporate events"). The first was the initial falloff of sales in the recreational boating line pursuant to a decline in the overall economic environment. The second was the advent of the luxury tax and its effect on the luxury motor yacht sales. However, this finding was not solely based upon the second triggering event. The Magistrate Judge specifically cited judicial and regulatory authority for segregating the time frame in question into multiple years for the computation and analysis of the percentage of terminated participants (the "significant percentage") when participant terminations are the result of industry volatility and occur in a multi-year time frame. *Id.* at 65.

The Magistrate Judge further concluded that in computing the significant percentage of employees terminated in relation to the triggering event, the court would not count those employees who retired, died, became disabled, were terminated for cause or who left voluntarily as having been terminated in relation to the triggering event(s) and therefore were not to be included as terminated employees. *Id.* at 65-76.

The Magistrate Judge determined that there were no factors present other than the numerical contraction of the Plan upon which a finding of partial termination could be based. He further concluded that the percentage of plan participants terminated pursuant to the triggering events was insufficient to support such a finding. *Id.* at 87. Based upon these considerations the Magistrate Judge made his finding as set forth above.

The district court accepted the report and recommendation of the Magistrate Judge and found that the report "was clearly correct" in applying the arbitrary and capricious standard of review. The district court itself conducted a *de novo* review of the record and agreed that the percentage of plan participants terminated was insufficient to justify a finding that a partial termination had occurred. *Id.* at 17. The motions of the Committee and Class II for summary judgment were granted. *Id.* at 19.

The Sixth Circuit reviewed the district court's grant of summary judgment *de novo*. The district court's decision was upheld by unanimous decision of a three judge panel. *Id.* at 9. Specifically the court of appeals determined that the Plan did give the Committee the requisite discretionary authority to determine whether a partial termination had taken place thereby triggering the arbitrary and capricious standard of review. *Id.* at 9-10. The court of appeals approved and adopted the percentages and methodology applied by the district court and Magistrate Judge. *Id.* at 12-14. Finally, the Sixth Circuit found that the Committee's determination "was neither arbitrary nor capricious" and that a partial termination of the Plan had not occurred as a result of the reduction in plan participants during the time frame in question. *Id.* at 15.

Petitioners' subsequent request for *en banc* rehearing was denied. *Id.* at 94-95.

## REASONS FOR DENYING THE PETITION

The petition for certiorari asserts that the issues presented are proper for consideration by this Court due in

part to errors by the lower courts in the interpretation and consideration of various factual matters and due in part to conflicts between the circuits on questions of law. Petitioners' position is not justified in either case. The issues presented for review by this Court do not warrant further consideration for the reasons set forth below.

## I. THE SIXTH CIRCUIT AND THE DISTRICT COURT PROPERLY APPLIED THE STANDARDS OF *FIRESTONE TIRE & RUBBER CO. V. BRUCH.*

### A. Application of the Arbitrary and Capricious Standard of Review.

Petitioners assert error in the Sixth Circuit's finding that the Plan grants the requisite discretionary authority to support judicial deference to the determinations of the Committee. Additionally, Petitioners claim that the standards as set forth by the Sixth Circuit are in conflict with the holdings of other circuits. Pet. 9-11. However, the attempts by Petitioners to demonstrate these conflicts only show Petitioners' own failure to fully comprehend the holding of this Court in *Firestone Tire & Rubber Co.*, 489 U.S. at 115. In the *Firestone* decision this Court ruled that "a denial of benefits . . . is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115.

The difficulty for Petitioners is that this Court did not require that the grant of discretionary authority be dependent on the incantation of the word "discretion" or some other magic word. Instead this Court directed lower

courts to focus on the breadth of the administrators' power and their "authority to determine eligibility for benefits or to construe the terms of the plan." *Id.*

Petitioners seek to demonstrate conflict between the circuits by the citation of a series of cases with single sentence summaries of the various holdings. Pet. 10. Such an exercise is overly simplistic and the claimed conflict disappears upon complete review of the cases and their holdings. While space does not permit a full review of the authority cited by Petitioners, any apparent conflict is typically the result of factual differences rather than interpretive decisions of law by the courts.

A majority of the cases in this arena deal with denial of benefits by a plan to one or more participants. A significant number of these cases involve health care, disability or death benefits provided by an employer or third party insurance provider. *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550 (6th Cir. 1998) (*en banc*) (denial of long-term disability benefits); *Cathey v. Dow Chem. Co. Medical Care Program*, 907 F.2d 554 (5th Cir. 1990) (termination of long-term nursing care benefits); *Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989) (denial of claim for accidental death benefits); and *Baxter By and Through Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989) (subrogation claim related to employee who had previously obtained benefits from health plan). These cases rarely involve the interpretation of a benefit plan that has the comprehensive structure of the Plan which was drafted with the intention of being employer sponsored and administered.

As a result the lower courts have labored in determining whether empowerment clauses tailored to narrow

claims issues provide discretionary authority to the plan administrator sufficient to avoid *de novo* review and support the deferential capricious and arbitrary standard of review. This has been especially true when the empowerment clause is examined within the context of the plan instrument as is present in much of the authority cited by Petitioners. For instance, in *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994) a discharged employee was seeking long-term disability benefits under an employee benefit plan. The plan fiduciary claimed that its decision should be reviewed under the arbitrary and capricious standard because the plan stated that the fiduciary had "authority to control and manage the operation and administration of the Plan." The Eleventh Circuit noted that

> Marriott may 'control and manage' the Plan, but it must do so in accordance with the terms of the Plan and there is *no grant of authority to construe these terms*. . . . The Plan contemplates that the administrator will determine whether a benefit is properly payable; however, there is no grant of discretion to accompany this mandatory function. . . .

(Emphasis added.) *Id.* at 789. The Eleventh Circuit holding is a strict application of the *Firestone* standard but it is consistent with the overall approach by the courts in taking the grant of authority in the context of the plan instrument. Despite Petitioners' assertions to the contrary, the Sixth Circuit has applied the same sort of reasoning by stating that "discretion is not an all-or-nothing proposition. A plan can give an administrator discretion with respect to some decisions but not others. . . . A plan

administrator has exactly the amount and type of discretion granted by the plan, no more, and no less." *Anderson v. Great West Life Assurance Co.*, 942 F.2d 392, 395 (6th Cir. 1991).

Petitioners assert the existence of conflict between the circuits by specific citation to two cases. The first is the 6th Circuit's *en banc* decision in *Perez v. Aetna Life Ins. Co.*,150 F.3d 550 (6th Cir. 1998) (*en banc*). The second is the Ninth Circuit's *en banc* decision in *Kearney v. Standard Ins. Co.*, ___ F.3d ___, Nos. 96-16539, 96-16701, 1999 WL 246485 (9th Cir. 1999). Both cases involve the denial of disability insurance claims by the insurance providers acting as third party administrators of an employer's disability plan. While it is true that the circuits disagreed on the construction of similar language contained in the plans that disagreement can hardly provide justification for review of this action. The conflict in opinion stemming from the *Perez* and *Kearney* decisions involves the determination as to whether a requirement for "satisfactory written proof" of a disability confers discretion upon the plan administrator to determine if the disability exists. *Kearney*, at ___, 1999 WL 246485, at *5; *Perez*, 150 F.3d at 555-556.

Such disagreement can in no way be applicable to the fact pattern presented in this case. As set forth above, the Plan was a complete and comprehensive employee benefit plan drafted so as to qualify under both ERISA and the Internal Revenue Code. Such plans are highly technical in nature and are subjected to Internal Revenue Service approval through the filing of qualification applications with the Service before they are granted tax qualified

status. 26 U.S.C. § 401. The scope of authority and discretion necessary to properly administer such a plan must and should be significant. This properly provides a context for the analysis of a specific grant of authority and the intended scope of such grant.

However, the most surprising aspect of Petitioners' application is their assertion that by the circuit court's decision in this case the Sixth Circuit is in conflict with itself. Pet. App. 13. To make this argument Petitioners are once again attempting to draw broad conclusions from judicial determinations that were intensely factual. The case cited by Petitioners is *Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368 (6th Cir. 1994).

The *Wulf* case involved the review of a determination of a plan administrator as to the amount of plan benefits to be distributed to the employees based upon their termination of employment resulting from the sale of the plant where the employees worked. Pursuant to the original provisions of the plan in question the terminated employees were entitled to the vested portions of their plan accounts. The sponsoring employer, however, retroactively amended the plan so as to reduce the value of the employees' vested benefit and the plan administrator sought to value the accounts in accordance with the amendment. *Id.* at 1370-1371. The administrator claimed that the arbitrary and capricious standard of review was appropriate due to the authority granted under the plan whereby "the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Committee as to any disputed questions shall be conclusive." *Id.* at 1373. Citing *Anderson v. Great West Life Assurance Co.* the

Court rejected the position of the plan administrator and noted the absence of any discretionary language specifically related to the issues attendant to the disputed transaction. *Id.*

In this action the grant of authority under the Plan specifically gave the Committee "all powers necessary . . . to administer the Plan," but more importantly also the authority to determine the eligibility of "Employees to become Participants," to determine "the amount of benefits payable to a Participant," and most significantly the power to construe and interpret "the Plan and the Trust Agreement ." Plan § 16(c). The court of appeals found such language to be a sufficient grant of discretionary authority not because of any individual phrase or magic word but because of the context and scope of the grant of power. Pet. App. 9-10. The determination of the Sixth Circuit was well-reasoned and well-based in precedent both outside and within the circuit. The finding of the court of appeals was solidly grounded in the principles of *Firestone*. The arbitrary and capricious standard of review was properly applied and should not be the basis for review by this Court.

### B. Does the Existence of Either a Question of Law or a Question of Fact Require De Novo Review?

#### 1. Question of Law

Petitioners contend that since a determination of partial termination relies upon an interpretation of a federal statute, specifically 26 U.S.C. § 411(d)(3), the courts should not grant deference to such determinations. This

argument turns *Firestone* completely upon its head particularly with respect to judicial review of retirement plans under ERISA and the Code. As noted above these types of plans are highly regulated and are typically composed of a series of provisions which are specifically required under the Code. A qualified retirement plan, whether it be a defined contribution plan, a defined benefit plan or a 401(k) deferral plan, is a statutory creation and heavily dependent upon statutory interpretation. If Petitioners' argument were to be adopted it would eviscerate the concept of an arbitrary and capricious standard of review.

The foregoing notwithstanding, a determination of whether a partial termination has occurred is primarily a factual issue. As set forth by treasury regulations, "Whether a partial termination of a qualified plan occurs . . . shall be determined . . . by the facts and circumstances in a particular case." Treasury Regulations § 1.411(d)-2(b). The Magistrate Judge noted that the primary factors for consideration were the size of the contraction, the resulting effect on the Plan, and the motive of the employer related to the reduction in employees. Pet. App. 82. In no case does this require an interpretation of statute or regulatory authority since both the Code and Treasury Regulations are silent as to the weight or priority to be given any individual factor.

The court of appeals specifically considered the arguments offered by Petitioner regarding the preclusionary effect of a question of law on the standard of review to be applied. The court clearly stated that such issue had been resolved in the Sixth Circuit under the holding of *Davis v. Kentucky Fin. Co. Retirement Plan,* 887 F.2d 689 (6th Cir. 1989). In adherence to that decision the court of appeals

here held that pursuant to the "grant of discretion" contained in the Plan, "the Committee possessed the power to interpret the language of terms in the plan." Pet. App. 10.

Petitioners cite *Weil v. Retirement Plan Admin. Comm'n*, 913 F.2d 1045 (2nd Cir. 1990), *rehearing*, 933 F.2d 106 (2nd Cir. 1991) (*Weil II*) and *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096 (5th Cir. 1990) as evidence of error on the part of the court of appeals and as evidence of a split between the circuits. The series of decisions referred to as *Weil I, Weil II* and *Weil III* can offer little guidance. This series of appeals, all pertaining to the same initial cause of action, are remarkable in their lack of consistency and like *Penn* are considered to be more out of the mainstream of authority with the passing of each day and rarely cited in contemporary argument. For a more accurate statement of the law in the Second Circuit Respondents cite *Jordan v. Retirement Committee of Rensselaer Polytechnic Institute*, 46 F.3d 1264 (2nd Cir. 1995). The remaining cases cited by Petitioner are distinguishable from the basic premise for which they are offered.

For instance, in *Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust*, 920 F.2d 651 (10th Cir. 1990) the Tenth Circuit examined the grant of discretionary authority contained in a qualified retirement plan. The court determined that the discretionary authority given to the plan administrator in the plan instrument was sufficient to justify a deferential standard of review. In its analysis of the standards of review the court of appeals stated that the decisions of a fiduciary are to be upheld unless they are "(1) arbitrary and capricious, (2)

not supported by substantial evidence; or (3) erroneous on a question of law." *Id.* at 657, citing *Sage v. Automation Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988) (quoting *Peckham v. Bd. of Trustees*, 653 F.2d 424, 426 (10th Cir. 1981)). By inference therefore, the mere presence of a question of law is insufficient to justify *de novo* review. Similarly, in *Gauer v. Connors*, 953 F.2d 97 (4th Cir. 1991) the Fourth Circuit was concerned with a technical interpretation of ERISA regulations and whether the plan administrator had made a clear error of law. *Id.* at 100.

Contrary to the arguments of Petitioners the mere existence of a question of law is insufficient to support de novo review. Rather there must be some demonstrated error in law committed by the fiduciary or plan administrator.

**2. Question of Fact.**

Respondent must admit to a level of fatigue with this argument. Petitioners first say there's not a sufficient grant of discretionary authority, give us *de novo* review. If there is discretion then there exists a question of law, give us *de novo* review. If no question of law exists then there is a question of fact, give us *de novo* review. Under Petitioners' systematic progression there is in fact no situation where the deferential standard would be applicable since Respondents cannot imagine a situation where there would not be either a question of law or a question of fact.

Petitioners raise this argument for the first time in these proceedings through their application. A review of

Section 16(c) of the Plan shows that the Committee is given the power to (1) resolve "all questions relating to the eligibility of the Employees to become Participants;" (2) determine "the appropriate allocations to Participants' Accounts;" and (3) determine "the amount of benefits payable to a Participant." Plan § 16(c). Each of these powers and the authority granted are dependent upon the accumulation and assimilation of information pertaining to the participants in the Plan. These tasks could not be performed unless the Committee was given the authority to accumulate the appropriate information, conduct an analysis of that information and render a determination.

While it may appear that Petitioners are attempting to assert that the facts of this matter are in controversy they did file the initial cross-motion for summary judgment thereby certifying that no factual dispute then existed and that the issues were proper for disposition by summary judgment. Any factual issues now raised are precluded by Petitioners' prior actions and are not proper for review by this Court.

### C. Did the Sixth Circuit Improperly Consider Facts Which Did Not Originally Form the Basis of the Committee's Finding That a Partial Termination Did Not Occur?

Petitioners assert that the lower courts acted incorrectly in considering information in their decisions not available to the Committee at the time it made its determination that a partial termination had not occurred. This

argument is a result of the position advanced by Respondents in the lower courts whereby the significant percentages of terminations should be computed separately for each of the Plan years encompassed by the time frame July 1, 1989 through June 30, 1991. As noted above, the lower courts accepted this argument and determined that the terminations for each fiscal year of the Plan should be computed individually in developing a significant percentage for such year. Each year was then examined individually to determine if the significant percentage of terminations for that year was large enough to support a finding of partial termination in the absence of any additional enhancement factors. Pet. App. 12-13, 65. Petitioner states that this is a finding based on facts not considered by the Committee in its original determination. Pet. App. 18-20.

This is not totally accurate. The facts forming the basis of Respondents' argument were considered by the Committee. They were aware of the overall level of participant terminations and they were aware of the effect of the luxury tax upon the participants employed at the Merritt Island and Palm Coast facilities. Pet. App. 84-86. There were no additional facts presented to the court of appeals or the district court which were not available to and received by the Committee. As such the authority cited by Petitioners is inappropriate to the argument. The Sixth Circuit did not consider improper factual arguments and no basis exists for reviewing its decision under this line of reasoning. Within the Sixth Circuit this holding is consistent with the prior precedent of *Davis*, 887

F.2d at 689, whereby a court may uphold an administrator's decision even on grounds not given by the administrator.

## II. DID THE COURT OF APPEALS PROPERLY APPLY THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THOSE CONCLUSIONS CRUCIAL TO THE HOLDING OF THE DISTRICT COURT?

Petitioners have essentially two arguments in advancement of this position. The first is the use of the second triggering event of the luxury tax as justification for separating the two year time frame examined by the lower courts into two separate testing periods and computing the significant percentage for each of these years separately. The second was the court of appeals' approval of the elimination of certain employee terminations from the computation of the significant percentage. Pet. App. 21.

Both of these arguments come from the same perspective. All parties have agreed, and the lower courts have ruled, that despite the multiple factors test advanced by regulation, Internal Revenue Service administrative rulings and the common law, the significant percentage can become so large as to be solely determinative of the issue of partial termination. *Id.* at 76; *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987). As a result, Petitioners have consistently sought any and all means to maximize the significant percentage while Respondents have sought to minimize the significant percentage. The bifurcation of the 1989-1991 time frame into two separate testing periods

did have a significant effect upon the computation of the significant percentage. Pet. App. 80-81.

Petitioners have now argued for the first time that the luxury tax could not have the effect claimed by Respondents Class II since it was passed in late 1990 and did not become effective until January, 1991. It is implied that Class II misled both the Magistrate Judge and the court of appeals by the advancement of this position. However, an examination of the record will show that Respondents Class II clearly stated in their Memorandum in Support of Their Cross-Motion For Summary Judgment and in Opposition to the Class I Defendants' Motion for Summary Judgment that the luxury tax became effective on January 1, 1991. App. 9.

As noted above, the determination of the Magistrate Judge to bifurcate the testing period into two separate years was not based solely upon the second corporate event. Also cited was the recurring nature of such an event as characteristic of normal industry volatility as well as the multiple year nature of the contraction. The court relied upon two decisions of other courts in determining that bifurcation was permissible, *Tipton & Kalmback, Inc.*, 83 T.C. 154 (1984) and *Kreis*. Pet. App. 65. In contrast Petitioner continues to cite a single case, *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991) *aff'd sub nom., Borst Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), for its position that bifurcation is improper. Unfortunately the precedential value of the *In re Gulf Litigation* is limited since the Fifth Circuit stated that in affirming the lower court the issue of partial termination had not been decided and that the district court's holding with

respect to that issue was not preclusive against the parties. *Id.* at 1314, n. 11.

Therefore, Petitioners are left asserting that the Sixth Circuit improperly affirmed the findings of the district court without offering any valid authority to the contrary. But more importantly even if this determination of the court of appeals is in error it would be harmless error since the aggregated significant percentage of participants terminated over the two year time frame would be 32.8%.

The second issue involves the court of appeals' affirmation of the district court's finding that certain employee terminations occurring during the July 1, 1989 to June 30, 1991 time frame were excludable from the computation of the significant percentage. These exclusions represented employees terminated for cause, employees terminated due to death or disability and employees who voluntarily terminated employment with the sponsoring employer but who failed to provide any reason for such termination. Pet. App. 12. It is this last group of terminated employees with which Petitioners are concerned. At all levels of review Petitioners have asserted that these voluntary terminations should be considered to have been constructively discharged as a result of the contraction of the Plan. Pet 26.; Pet. App. 12, 71-76.

Petitioners cite extensively from the Tax Court's opinion in *Halliburton Co. v. CIR*, 100 T.C. 216 (1993), *aff'd*, 25 F.3d 1043 (5th Cir.) which contains an extensive analysis of the issue of what employees make up the class of terminated employees for purposes of the computation of the significant percentage. However, neither regulatory

authority nor *Halliburton* supports the Petitioners to the extent they claim. Treasury Regulations imply that only employer-initiated terminations should be counted due to the use of the term "severance by the employer" of plan participants. Treas. Reg. §§ 1.411(d)-2(b)(1); *Halliburton* at 240. This would specifically exclude any employees whose employment was terminated for any reason not specifically attributable to employer action related to the corporate event. Generally, the courts have found this too stringent a standard and have acknowledged the possibility that a constructive discharge may take place in those circumstances where employees resigned either where intolerable working conditions are created by the employer or it is clear that there is no prospect for continued employment. *Kreis*, 833 F.2d at 81-82; *Collignon v. Reporting Serv. Co.*, 796 F. Supp. 1136, 1141-42 (C.D. Ill. 1992); *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1303 (E.D. La. 1989) *aff'd*, 914 F.2d 83 (5th Cir. 1990). The Court in *Halliburton* concurred with these prior decisions and excluded these employees in its analysis but it also clarified the issue by stating

> [S]ome employees might leave their jobs of their own accord, even when economic situations are bad, because of dissatisfaction with their situations or for personal reasons. The partial terminations rule was not meant to protect such persons – they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do. Moreover, vesting their benefits would not necessarily deter abuse by employers.

*Halliburton* at 241.

The Tax Court concluded that simple concern over the future was insufficient to sustain a claim of constructive discharge. The employer must have overtly and purposefully created a hostile and unbearable work environment or the employee must have actual notice that his employment is about to be terminated such as an actual closure notice.

The Sixth Circuit was even more stringent in *Kreis*

> The employee's perception of his situation is judged objectively. "An employee may not be unreasonably sensitive to his working environment. A constructive discharge occurs only when a reasonable person would find conditions intolerable."

*Kreis*, 833 F.2d at 82 (quoting *Henry v. Lennox Indus.*, 768 F.2d 746, 752 n. 3 (6th Cir. 1985) [quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)]).

Petitioners seek to establish a judicial inference that penalizes a sponsoring employer when that employer is experiencing a cyclical downturn in economic performance by having all employee departures be counted against the employer under the theory that mere concern for job stability is sufficient for a finding of constructive discharge. This is a disincentive to employee loyalty in times of employer stress. Petitioners have offered no authority that would justify having the voluntarily terminated employees included in the numbers of employees terminated as a result of the significant corporate events.

Petitioners claim that the Sixth Circuit misapplied the standard of review and seek reversal due to the court of appeals' failure to hold the district court action to a more

stringent standard. However, Petitioners have not demonstrated where the Sixth Circuit was in error and have no authority upon which to base their assertions. There were no disputed facts as evidenced by the cross-motions for summary judgment. No error exists in the court of appeals' affirmation of the methodology applied by the district court. No conflicts exist between the circuits on the issues presented. In the absence of a factual dispute between the parties there was no basis for the court of appeals to reverse the findings of the district court.

## III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**RESPONDENT'S EXHIBIT**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE**
**NORTHERN DIVISION**

| | | |
|---|---|---|
| **ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, et al.,** | ) | **Civ. # 3-92-0587** |
| **Plaintiffs** | ) | **(Filed Mar. 4, 1996)** |
| **v.** | ) | |
| **DANIEL ROBINSON, et al.** | ) | |
| **Defendants.** | ) | |

## CLASS II DEFENDANTS MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE CLASS I DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Class II defendants, having filed a Cross-Motion for Summary Judgment and in response to the motion for summary judgment filed by the Class I defendants, submit this memorandum of law in support of their cross-motion for summary judgment and in opposition to the Class I defendants' motion for summary judgment.

## I. INTRODUCTION

This action was initiated by the plaintiffs, the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (the "Committee") and William J. Barrington, Dianne M. Yaconetti, and William R. McManaman as members of the Committee, by

their Class Action Complaint as filed on August 25, 1992. The complaint requested declaratory judgment as to whether a "partial termination" had occurred with respect to the Sea Ray Employees' Stock Ownership Plan (the "Plan") within the meaning of the Internal Revenue Code ("IRC"), the Employee Retirement Income Security Act ("ERISA"), and the terms of the Plan.

The Plan is a combination Employee Stock Ownership Plan ("ESOP") and Profit Sharing Plan qualified under the provisions of the Internal Revenue Code and ERISA so as to allow the employer to make annual contributions to the Plan for its participating employees' benefit while deducting the contributions as salary expense for tax purposes. **IRC § 404.**

Under the terms of the Plan these contributions are invested and held in either qualifying employer securities or diversified investments and allocated to the individual accounts of the plan participants based on a predetermined allocation formula contained in the Plan's governing agreement. **See Treas. Reg. § 1.401-1(b)(1) (ii); Plan Section 5.** The participant is not required to recognize these allocations on his individual income tax return until the assets are distributed to him from the Plan. **IRC § 402.**

A participant does not necessarily own his account. His right to the account assets is determined in accordance with a vesting schedule as contained in the Plan's governing agreement. The vesting schedule attributes percentage ownership of a participant's account based on years of service rendered by the participant to the sponsoring employer.

There are two alternative vesting requirements under the Internal Revenue Code: (i) 5 year cliff vesting; and (ii) 3/7 vesting. **See Temp. Reg. 1.411-3T.** An employer may have a more liberal schedule such as a three year cliff (meaning that for three years the participant is 0% vested but after three years the participant is 100% vested) but it may not be more stringent.

The Plan used the 3/7 vesting schedule as follows:

| Years of Service | Vested Percentage |
|---|---|
| Less than 3 years | 0% |
| 3 years | 20% |
| 4 years | 40% |
| 5 years | 60% |
| 6 years | 80% |
| 7 years | 100% |

**See Plan Section 10.**

If an employee/participant terminates service prior to becoming 100% vested then the participant receives only the portion of his account that is vested. The remaining amount is forfeited and reallocated to the remaining participants accounts based on the allocation formulas of the Plan. **Id.**

The complaint focused on corporate events of the sponsoring employer, Ray Industries, Inc. ("Sea Ray"), over a time frame that included all or parts of calendar years 1989, 1990 and 1991. In this time frame Sea Ray experienced a severe economic downturn that resulted in significant lay-offs in the Sea Ray workforce and correspondingly in the participants of the Plan. The central issue in this action is a determination as to whether such

constriction of the Plan's participants resulted in a partial termination of the Plan.

If a partial termination occurred, the account balances of all participants in the Plan became 100% vested as of the time of termination. **See Plan Section 19.** If a partial termination did not occur, then the non-vested portions of the accounts of those participants who were terminated as employees of Sea Ray during the economic downturn will be forfeited by those participants and the forfeited assets will be re-allocated among the remaining participants.

Therefore, the final determination as to whether a partial determination [sic] did occur will impact two groups of current and former Plan participants. The definition of these two groups has been the subject of extensive negotiation between legal counsel. The Order of this Court dated April 13, 1993 delineated two classes of participants for the purpose of initial examination, but reserved a final determination of the classes and time frame to be examined pending offer of proof by the parties. Under said Order Class I and Class II were defined as follows:

> Class I: All former Sea-Ray employees who were participants in the plan, and whose service as employees ended between July 1, 1989, and June 30, 1991, and who had an interest in the plan that was not fully vested, as well as the beneficiaries of those former Sea-Ray employees; and
>
> Class II: All present and former Sea-Ray employees who are or were participants in the plan and who may be

> entitled under the terms of the plan to receive a portion of the forfeitures resulting from the termination of employment of members of Class I, as well as the beneficiaries of those present and former Sea-Ray employees.

The time frame in question reflects two of the Plan's fiscal years based on the July 1 to June 30 fiscal year.

It should be noted that a mutuality of interest exists between the plaintiffs and the Class II defendants. By the plaintiffs' determination that a partial termination took place, Class II stands to receive the reallocation of the forfeited assets.

## II. Facts

### A. Employer History.

Sea Ray is a manufacturer and marketer of fiberglass recreational boating craft dating back to its inception in the 1950's. Since 1986, Sea Ray has been a wholly owned subsidiary of Brunswick Corporation as part of its Marine Group of manufacturing entities. The company has developed a full product line of pleasure craft from sport boats to luxury motor yachts. **Cmplt. § 49.** There are no other product lines. Since the entire manufacturing capacity is dedicated to leisure products the company is particularly sensitive to economic cycles. **Plaintiff's Ex. VI, Economic Intelligence Company, Report to Brunswick Corporation 1.**

During the 1980's the U.S. boating industry experienced a unprecedented growth cycle. From 1983 to 1986

annual sales grew at an average rate of 35%. **Id. at 5.** Sea Ray's own sales figures reflected these increases.

On July 1, 1985 Sea Ray was operating seven facilities: (i) Oxford Plant, Oxford, Michigan; (ii) Phoenix Plant, Phoenix Arizona; (iii) Merritt Island Plant, Merritt Island, Florida; (iv) Knoxville Plant, Knoxville, Tennessee; (v) Tellico Plant, Vonore, Tennessee; (vi) Palm Coast Plant, Palm Coast, Florida; and (vii) Ray Industries Corporate Headquarters, Knoxville, Tennessee.

To meet the increased demand during the 1980's Sea Ray added significant plant capacity by building new plants and purchasing already existing manufacturing facilities. By July 1, 1989 Sea Ray had expanded to thirteen facilities, the previously listed seven plus: (viii) Cherokee Cove Plant, Madisonville, Tennessee; (ix) Product Development & Engineering, Merritt Island, Florida; (x) Fort Mill Plant, Fort Mill, South Carolina; (xi) Transportation Division, Knoxville, Tennessee; (xii) Riverview Plant, Knoxville, Tennessee; and (xiii) Sykes Creek Plant, Merritt Island, Florida. Additionally, the company acquired a plant in Cork, Ireland which is not part of this action. **Deposition of William J. Barrington, President and CEO, Ray Industries, Ex. 1, pp. 73-84; and Cmplt § 50 & 51.**

In early 1989 a slight softening was detected in industry sales figures followed by a precipitous fall in late 1989. **See Plaintiffs' Ex. VI at 5.** Sea Ray suffered a significant drop in sales of all product lines except the luxury yachts. In 1990, the federal government instituted a luxury tax that targeted high ticket consumer goods such as automobiles, aircraft and yachts. As a result the

luxury yacht market suffered a drastic drop in sales. **Barrington Dep. pp. 39, 86.**

Sea Ray total sales for this entire time frame are as follows:

| Year | Units Sold |
|---|---|
| 1985 | 12,456 |
| 1986 | 15,916 |
| 1987 | 22,355 |
| 1988 | 24,538 |
| 1989 | 23,214 |
| 1990 | 14,343 |
| 1991 | 10,542 |

**See Cmplt. § 49.**

Sea Ray uses a marketing and sales mechanism that is based on input from dealers both on an annual projection and on quarterly updates. The annual projection was divided into quarters and the dealers were expected to purchase their quota in each quarter. **Barrington Dep. 124.** Sea Ray would then structure its manufacturing output to match these projections. During the projected year the dealers obtain their market product by a series of orders made at designated times. **Barrington Dep. 134.** The first indication that sales were underperforming would be an accumulation of inventory at the dealers level and a resultant drop in the quarterly orders.

Because of the continuous ordering structure, drops in sales become immediately evident subject to analysis of the data. **Id.** This allows Sea Ray to make rapid adjustments to production. However, there is a built in delay where production continues at the projected rather than

actual need and results in an increased impact on the workforce. **Barrington Dep. pp. 135-137.** The first noticeable drop in sales (33%) occurred in the months of March/April 1989 with the first announcement of layoffs coming in May, 1989. **Barrington Dep. 135.**

**B. Effect on Plan Participants.**

Not all employees were participants of the Plan. An employee becomes a participant of the Plan upon the completion of one full year of service (defined as a year in which the employee is credited as having 1000 hours of service). **Plan Section 3.**

On July 1, 1985 total number of Plan participants was 1,501. **See Cmplt. § 50.** By July 1, 1989, at the end of the expansion cycle, there were 3,832 Plan participants.

In reaction to the sudden drop in sales occurring in March/April 1989, Sea Ray issued official notices of temporary layoffs for 10% of the Tennessee workforce. **Class I Coll. Exh. 2.**

This proved inadequate when May sales figures reinforced the downward trend and in July, 1989, management announced the closure of the Cherokee Cove, Riverview and Ft. Mill plants. **Barrington Dep. 137.** The corporation attempted to stabilize the workforce and determine the extent of the downturn. However, sales figures for July, August and September confirmed the continuing drop in the market and additional layoffs were announced in November which were reflected in December, 1989 and January, 1990 employment statistics. **Id. at 138; Weekly Plant Comparisons, Ex. 2.**

Employment did stabilize at that point with only small reductions in workforce taking place for February through June of 1990. **Class I Ex. 7.**

By June 30, 1990, the number of Plan participants stood at 3,060. **Cmplt. § 52.**

The downward trend continued through 1990 into 1991 enhanced by the effect of the advent of the luxury tax which was effective as of January 1, 1991. At the beginning of the 1991 fiscal year (7/1/90), the Merritt Island and Palm Coast facilities, which produced the high end luxury yachts, were still employing 1037 employees, only 1 less than the 1038 employed on July 14, 1989. Due to the effects of the luxury tax, the June 30, 1991 employment at the two facilities had dropped to 583 persons. **Ex. 2.**

The number of Plan participants were similarly affected. For fiscal year ending June 30, 1991 the number of Plan participants dropped to 1,968. **Cmplt. § 53.**

**C. Participant Statistics.**

Counsel for the litigants have expended substantial time and effort in attempting to construct a mutually agreeable database of participant statistics. This has not been universally successful. As noted above, Class II and plaintiffs have a mutuality of interests in this action. Therefore, Class II adopts the characterization of the data as presented in plaintiffs' brief at pages 37-38. By permission and for purposes of consistency, portions of that brief are incorporated herein. Class II has not participated

in the compilation of these statistics and relies upon the representations of plaintiffs.

[From] [a] review of the briefs of Class I and plaintiffs it is apparent that the parties do agree to the following:

> 1. The total number of plan participants was 3,832 as of July 1, 1989, declined to 3,060 as of June 30, 1990 and to 1,968 as of June 30, 1991. Class I Brief at 21, 25, 50; Complaint ¶¶ 51-53; Class I Exs. 12-14 (census lists).
>
> 2. According to the Class I Brief, an additional 307 plan participants were added after July 1, 1989, including 252 additions in the 1989-1990 Plan year and 51 additions in the 1990-1991 Plan year. Class I Brief at 21, 27.[1]
>
> 3. The terminated participants include 396 who were fully vested, including 123 during the 1989-1990 Plan year and 273 during the 1990-1991 Plan year. Class I Brief at 26, 28, 50; Class I Exs. 12-14 (census lists).
>
> 4. The total number of participants for the 1989-1990 Plan year is 4,084 (the number at the beginning of the year, 3,832, plus the number added during the year, 252). The total number of participants for the 1990-1991 Plan year is 3,111

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[1] The 307 participant adjustment is a late revision by Class I. See Ex. 3. The Class I Brief does not include a separate listing or any other way of readily identifying those 307 new participants but Class I is in the process of compiling the records to support this assertion. Plaintiffs and Class II have tried to replicate that number without success. Rather than delay the briefing process, we assume for the purpose of this brief that the 307 count is correct. Class II reserves the right to challenge that calculation in our reply brief.

(the number at the beginning of the year, 3,060, plus the number added during the year, 51). For the entire two-year period, the total number of participants is 4,139 (the number at the beginning of the period, 3,832, plus the number added during the period, 307).

5. The total reduction in participation for the 1989-1990 Plan year is 1,024 (the total number of participants for the year, 4,084, minus the number remaining at the end of the year, 3,060). The total reduction for the 1990-1991 Plan year is 1,143 (the total number of participants for the year, 3,111, minus the number remaining at the end of the year, 1,968). The total reduction for the two-year period is 2,171 (the total number of participants over the two-year period, 4,139, minus the number remaining at the end of the period, 1,968).

Class I has proposed a series of adjustments to these numbers based on its review of certain underlying documentation provided by Sea Ray. Early in the discovery process, Class I indicated a significant discomfort with the statistical information provided by the employer. These adjustments and their applicability are more appropriately discussed subsequent to the analysis of the law contained hereunder.

**D. Determination of Plan's Administrative Committee.**

Having noted the decline in employment and participation levels, the Plan's Administrative Committee raised the issue in its meeting of June 12, 1992. **Plaintiff's Ex. IV.** On June 26, 1992 the Committee made a determination

that under the applicable facts and circumstances a partial termination of the Plan had not taken place. **Plaintiff's Ex. V.** As a result, the participants who experienced a termination of their employment with Sea Ray from 1989 through 1991 and who were not 100% vested in their account balances were entitled to a distribution of only the vested portion of their accounts. The nonvested portions would be considered to be forfeited and were to be reallocated to the remaining participants. **Id.** The reallocation was suspended pending judicial determination of whether there has been a partial termination. **Cmplt. §§ 61-62.**

## III. LEGAL ANALYSIS

As noted, the central issue in this action is the determination of whether or not a partial termination has occurred as a result of the reduction in Plan participation.

### A. History of Statute.

The concept of vesting through termination of a plan was initiated by Treasury regulations before ever appearing in statutory form. The termination of a plan as a vesting event was codified in 1962 in 26 U.S.C. § 401(a)(7). In essence the statute stated that the termination or discontinuance of contributions to a plan would act to render the employees accounts nonforfeitable. The legislative history stated

> [T]he bill precludes the possibility that contributions for employees which have been deducted for income-tax purposes may revert back to the employer. . . . This requirement should serve to

> prevent abuses resulting from termination of plans.

H.R.Rep. No. 378, 87th Cong., 1st Sess., reprinted 1962-3 C.B. 261, 269. The statute did not make mention of the concept of partial termination. This was formulated by Treasury Regulations in 1963 whereby termination was defined to include "both a partial termination and a complete termination of a plan." **Treas. Reg. § 1.401-6(b)(2) (1963).**

At the time, the stringent vesting schedules now required under law did not exist. Employers were allowed to require that the employee maintain employment under specific terms as a condition to vesting. Terminated employees often forfeited their entire account balances. The concern, as stated in the legislative history, was that "an employer could establish a forfeitable plan, enjoying the tax benefits flowing therefrom, and then terminate it, thus causing the assets to revert to the employer with favorable tax consequences." ***Halliburton Co. v. Commissioner,* 100 T.C. 216, 226 citing H.Rept. 87-378 at 16 (1961), 1962-3 C.B. 261.** Clearly the concern of the legislature was the prevention of abuse.

In 1974 a massive rewriting of the retirement plan law occurred under the Employment Retirement Income Security Act of 1974 ("ERISA"). **29 U.S.C. §§ 1001-1461.** As part of this legislation Congress enacted IRC § 411(d)(3) which provides that

> [A] trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that –

> (A) upon its termination or partial termination,
>
> . . . .
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

In 1977, the Secretary of the Treasury promulgated regulations that are stunning by their brevity and by the fact that they continue unamended despite continued revision of the statutory scheme under ERISA. Without the usual guidance of examples the Treasury stated

> (b) Partial Termination. (1) General Rule. Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

**Treas. Regs. § 1.411(d)-2(b).** The exclusion by severance of plan participants has become known as a "vertical partial termination". ***In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1163 (S.D. Tex. 1991).** It is this type of termination with which we are concerned.

**B. Interpretation of Statute.**

Since passage of the statute and the implementation of the regulations, a substantial body of case law and administrative interpretation has been devoted to ascertaining what facts and circumstances are applicable in making a determination of partial determination.

**1. Internal Revenue Service.**

Through a series of revenue rulings and technical advice memoranda the Service traditionally took the approach that the termination rules existed to prevent abuse of the tax benefits of the law. **See TAM 6512108240A (Dec. 10, 1965) and TAM 7312286880A (Dec. 28, 1973); See also Rev. Rul. 73-284, 1973-2 C.B. 139 and Rev. Rul. 72-439, 1972-2 C.B. 223.** The majority of these rulings adhered to this anti-abuse character even in the face of high termination percentages.

In the 1980's the emphasis of the IRS changed to where greater weight is given as to whether a "significant percentage of employees were . . . excluded from participating in the plan." **IRS, *Plan Termination Handbook*** § 252(6). In Revenue Ruling 81-27 the IRS stated there was a point where the severance percentage could be so great as to preclude other considerations.

However, the Plan Termination Handbook still states that there are factors other than a reduction in participant levels which must be considered: (i) Whether the potential for reversion has been created or increased as a result of participant turnover; and (ii) Whether the possibility

for prohibited discrimination has increased. **Id., §§ 252(8)&(10).**

### 2. Caselaw – Factors to be Considered.

Much of the litigation involving partial termination has occurred in the 1980's. The vast majority of this law has acknowledged that the facts and circumstances test mandates a review of all aspects of the reduction in workforce. **See *Bruch v. Firestone Tire and Rubber Company*, 828 F.2d 134 (3rd Cir. 1987); *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987); and *Sage v. Automation, Incorporated Pension Plan and Trust*, 845 F.2d 885 (10th Cir. 1988).**

#### a. Two Part Inquiry.

The opinion in *Kreis*, the controlling case in the Sixth Circuit, states there are two basic inquiries that must be made in applying the facts and circumstances test: (i) the effect on the plan of the exclusion of employees from participation; and (ii) the decision maker's motives.

A significant factor in the first inquiry is the percentage of plan participants who are involuntarily excluded. The Sixth Circuit acknowledged that the percentage of termination may be so high as to be solely determinative. ***Kreis v. Charles D. Townley, M.D., & Assoc., P.C.*, 833 F.2d at 80 citing *Bruch v. Firestone* and *Ehm v. Phillips Petroleum*, 583 F.Supp. 1113 (D.Kan. 1984).** However, the court clearly stated "as a general matter we must look beyond the mere percentages unless and until Congress or the Treasury Department provides otherwise." **Id.**

As part of the first inquiry, a determination should be made as to "the extent the Plan is affected financially by the discharges." **Id.** Terminations that represent a small percentage of employees may be significant if they disproportionately impact the financial viability of the plan.

The second inquiry focuses on the decision maker, i.e., did the employer exclude the plan participants "in a predatory effort to profit from subsequent forfeitures and/or diminished contribution requirements?" **Id. See also *Babb v. Olney Paint Co.*, 764 F.2d 240, 245 (4th Cir. 1985) and *Bruch v. Firestone Tire and Rubber Company*, 828 at 530.**

**b. Percentage Test – the Numbers.**

**(1) Percentages Sustaining Partial Termination.** The Sixth Circuit in ***Kreis*** engaged in a substantial review of the caselaw then in effect for the purpose of determining what percentages had been considered to be significant to the point of solely sustaining a finding of partial termination. The Court noted that the lowest percentage sufficient to find a partial determination was the 34% of ***Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984).** ***Tipton & Kalmbach*** involved a multi-year time frame over which the workforce reduction occurred. In year 1 the reduction was 34% followed by a 51% reduction in year 2. The Tax Court determined that a partial termination occurred in each year.

It should be noted that the Tax Court rejected the argument that any factor other than percentage of participant terminations should be considered. **Id. at 161.**

Acknowledging that the Tax Court was inferring a broader purpose for the statutory provisions, the ruling states that the Congressional intent was the protection of employees from forfeiting their retirement benefits upon termination of a plan. **Id.** This position has not been supported by any other authority known to Class I and was subsequently reinterpreted by the opinion of the Tax Court in ***Halliburton v. Commissioner, supra,*** nine years later. Therefore, this ceiling is of dubious authority.

The *Tipton & Kalmbach* numbers are the lowest percentages that have been found to sustain a finding of partial termination. Normally, when a determination of partial termination is based solely on the percentage of participants terminated, those percentages exceed 50%. **See *Peter M. Boruta, M.D., P.C. v. Commissioner,* T.C. Memo. 1988-172 (66.66%); and Revenue Ruling 1-27, 1981-1 C.B. 228 (57.6%).** This would seem a logical analysis in that a percentage reduction greater than 50% in any one year represents the loss of a majority of participants.

**(2) Percentages Insufficient for Partial Termination.** The *Kreis* court also reviewed the highest percentages deemed to be insufficient to sustain a finding of partial termination. The court cited three examples: (i) 16.7%, ***Wishner v. St. Lukes's Hosp. Center,* 550 F.Supp. 1016 (S.D.N.Y. 1982)**; 13%, ***Taylor v. Food Giant, Inc. Salaried Employees Pension Plan,* No. C84-253A (N.D.Ga. Nov. 30, 1984)**; and 12.4%, ***Babb v. Olney Paint Co., supra.*** Based on this analysis, *Kreis* found that multi-year termination rates of 15% and 13.6% were not plan terminations. This has been further supported by the Tax Court in ***Halliburton Co. v. Commissioner, supra,*** 19.85%.

There is no statutory basis for the cutoff of the 20% floor. As noted by *Halliburton* the origin of the rule may well be a pre-ERISA report which was required to be filed with the IRS any time there was a drop of greater than 20% of plan participants. **See *Halliburton* at 237, fn 8.**

**c. Anti-Abuse Factors.**

The Third Circuit in *Bruch* stated the significance of the presence of abuse factors in the strongest terms

> We believe that the structure of the statute suggests that a partial termination should be found under § 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to employees.

***Bruch* at 151.** This is consistent with the legislative history of the statute and the concern that the liberal vesting rules of the 50's and 60's allowed for the abuse of the income tax system. The Third Circuit was firm on the necessity of a finding of abuse on the part of the employer. However, as noted above a substantial body of case law and administrative rulings has mitigated this opinion. The existence or nonexistence of employer abuse serves to slide the percentage scale rather than prevent or assure a finding of partial termination. **See *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d at 80, 81; *Halliburton Co. v. Commissioner*, 100 T.C. at 232.**

The Tax Court has acknowledged the sliding scale:

> Between the two extremes, where the percentage drop has not been sufficient in and of itself to establish that a partial termination has occurred, the surrounding facts and circumstances have been considered in conjunction with the percentage drop in order to decide whether the percentage drop is significant.

***Halliburton Co. v. Commissioner*, 100 T.C. at 237, citing *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.* 833 F.2d at 79-80.**

Therefore, absent a percentage of terminations of less than 20%, which would mandate a finding that no partial termination occurred, and a percentage of terminations greater than 50%, which would mandate a finding that partial termination had occurred, the body of law requires that a balancing take place that determines the presence or lack of an abusive intent on the part of the employer. Where there is not a finding of abusive intent the threshold percentages of termination must necessarily be high to support a finding of partial termination. Where there is evidence of an abusive intent the threshold percentages of termination may be lowered to prevent the intended abuse.

**d. Multi-year Terminations.**

In those situations where terminations have occurred over a substantial period of time the courts have been willing to break the terminations down into separate groups for the purpose of calculating the appropriate percentages. The issue is whether the terminations occur

as the result of a single corporate event. **See *Halliburton*, 100 T.C. at 230; *Weil V. Retirement Plan Administrative Committee*, 750 F.2d 10, 12 (2nd Cir. 1984) ("Weil I").** A long-term corporate downturn associated with normal industry volatility is not considered to be a single event and may be measured in separate years. ***Tipton & Kalmbach, Inc.*, 83 T.C. at 155; See also *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d at 83.** The IRS has also accepted the concept of segregating multiple year terminations into separate percentage breakdowns for analysis. **See *Plan Termination Handbook* § 252(5)(c).**

**e. Inclusion of Participant Classes.**

In computing the measuring percentages the most difficult issue is the determination of the various classes that the participants fall into and the usage of those classes in the computations. The Tax Court in *Halliburton* reviewed the various classes constituting the participants in the plan there in question.

The first group of these were classes of separated employees who would not be counted in the termination percentages. These included deaths, normal retirements and terminations for cause. The litigants had agreed prior to trial that these participants would be excluded. The Tax Court reviewed this agreement with approval stating that the terminations were not "attributable to Halliburton's reductions in force and so . . . not affected by such action." ***Halliburton Co. v. Commissioner*, 100 T.C. at 238, citing with approval *In re Gulf Pension Litigation*, 764 F.Supp. at 1168 and *Morales v. Pan Am. Life Insurance Co.*, 718 F.Supp. 1297, 1302 (E.D.La. 1989).**

In making a determination as to partial termination, the focus of the review is on the plan participants who were excluded from the plan in connection with the corporate event. **See *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d at 79.** Therefore, a question may arise as to participants that left employment voluntarily but who may be considered to have left because of their concern over the financial health of the employer. The regulations imply that only employer-initiated terminations should be counted due to the term "severance by the employer" of plan participants. **See Treas. Reg. § 1.411(d)-2(b)(1); and *Halliburton Co. v. Commissioner*, 100 T.C. at 240.** However, the courts have acknowledged a possibility that a constructive discharge may take place in those circumstances where the employee resigned due to intolerable working conditions created by the employer, ***Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d at 81-82**, or it is clear that there is no prospect for continued employment. ***Collignon v. Reporting Services Co.*, 796 F.Supp. 1136, 1141-1142 (C.D.Ill. 1992); *Morales v. Pan Am. Life Insurance Co.*, 718 F.Supp. at 1303.** The Court in *Halliburton* concurred with these prior decisions and excluded these employees in its analysis and clarifying the issue by stating

> [S]ome employees might leave their jobs of their own accord, even when economic situations are bad, because of dissatisfaction with their situations or for personal reasons. The partial terminations rule was not meant to protect such persons – they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do.

Moreover, vesting their benefits would not necessarily deter abuse by employers

***Halliburton* at 241.** The Tax Court concluded that simple concern over the future was insufficient to sustain a claim of constructive discharge. The employer must have overtly and purposely created a hostile and unbearable work environment or else the employee must have actual notice that his employment is about to be terminated such as an actual closure notice.

Any employer has a turnover rate that may be derived from historical data. **See *Plan Termination Handbook* § 252(6)-(7).** This would be an appropriate adjustment to the computations to be performed in this action. Class II concurs with plaintiffs' decision to infer a turnover rate at this time but reserves the right to do so on the event the Court should deny the Class II motion.

**f. Formula for Computation.**

In determining the percentage of terminated participants, the Court must compute the significant percentage fraction, the denominator of which is the total number of plan participants at the beginning of the time frame in question plus the number of participants added during the time frame. The numerator is the number of plan participants terminated from the plan during the time frame minus those excludable employees. ***IRS Plan Termination Handbook*, § 252(7).** The fraction is as follows:

$$\frac{\text{Total Reduction minus Excludable Employees}}{\text{Total Number of Participants}}$$

## IV. APPLICATION OF LAW

### A. CORPORATE EVENTS.

From the facts presented it is obvious that the overall triggering event was a significant economic downturn in the recreation boating industry that began in 1989. The downturn was rapid and severe and was reflected by substantial reductions in the workforce and the closing of three manufacturing facilities. By January 1990, Sea Ray had stabilized its workforce and had in fact initiated some recalls of personnel. However, upon the imposition of the luxury tax an additional drop of sales occurred which resulted in significant terminations at the Merritt Island and Palm Coast facilities and the closure of the Oxford facility. These terminations are graphically presented in Ex. 4. The distinct peaks and valleys of the graphs show the concentrated impact of two distinct events occurring in two separate fiscal years.

Under the holding of *Tipton & Kalmbach* these events should be segregated and the termination percentages computed for the two separate fiscal years.

### B. COMPUTATION OF PERCENTAGES.

As noted hereinabove the parties have agreed on the following numbers:

| Plan Year | Number of Participants | Participant Terminations |
|---|---|---|
| 1989-1990 | 4,084 | 1,024 |
| 1990-1991 | 3,111 | 1,143 |

The question still to be resolved is the adjustments to the statistics. As noted above Class II does not seek at this time to imply a normal turnover percentage.

The dispute does center around individuals who voluntarily terminated employment during the time frame in question. A great deal of effort has been expended in reviewing source documents, particularly the Change of Employee Status forms which were designed for use by the personnel directors of each facility. As Class I indicates, each facility manager was given a great deal of autonomy in managing his/her personnel matters. **Class I brief at 18.** As a result certain aspects of record keeping were irregular at best. The Change of Status forms were used in varying amounts of detail and did not prove to be universally dispositive of the issue. Based on anecdotal information received by counsel for Class I through personal contact with various members of the class, Class I was concerned that the termination categories were not accurate.

Much of Class I's concern is generated by the incompleteness of the Change of Status forms. However, one fact remains clear. The Change of Status forms were internal documents used by individual plant managers. The Plan census forms on the other hand were the documents prepared company wide which formed the basis of IRS reports and account allocations and which were based on payroll information. There has not been any allegation known to Class II that errors have been committed in the accounting for individual participant accounts. As such these documents must be considered to be the most accurate of the source materials.

Based on its concern over discrepancies between the Change of Status forms and the Plan census forms Class I proposes a drastic resolution. All employees who voluntarily terminated employment from July 1, 1989-June 30, 1991 should be treated as terminated participants. This is both drastic and insupportable. While Class I points out that many employees would justifiably seek employment elsewhere during the constriction of the workforce this does not fit the definition of a constructive discharge as set forth under the caselaw.

Therefore, Class II does adopt the adjustments proposed by plaintiffs in plaintiffs' Ex. I and referred to in plaintiffs' brief at 39. Because of the late adjustments received from Class I, the computations of plaintiffs result in greater percentages of termination than do the computations of Class II.

1989-1990:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(1{,}024 - 373)}{4{,}084} = 15.94\%$$

1990-1991:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(1{,}143 - 275)}{3{,}111} = 27.9\%$$

1989-1991:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(2{,}167 - 648)}{4{,}139} = 36.7\%$$

Plaintiffs have provided computations of the termination percentages based on the assumption of Class I that voluntary terminations should be included. While Class II does not agree with that position for the purposes of

clarity and in light of the changes reflected in Ex.3, Class II provides the same alternative Calculation II.

1989-1990:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(1{,}024 - 102)}{4{,}084} = 22.6\%$$

1990-1991:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(1{,}143 - 109)}{3{,}111} = 33.2\%$$

1989-1991:

$$\frac{\text{Total Reduction minus Excludable Terminees}}{\text{Total Number of Participants}} = \frac{(2{,}167 - 211)}{4{,}139} = 47.3\%$$

C. ANALYSIS OF COMPUTATIONS.

The record is clear on the corporate history of Sea Ray. The reductions in workforce were the result of outside economic factors. These factors were not a single event rather they were a combination of events that occurred sequentially. The initial downturn in the small craft boating industry did not affect the luxury yacht sales. The industry did remain in the doldrums during the entire time frame in question, however, this was enhanced by the drastic drop in luxury yacht sales. A review of the sales figures show the initial drop of sales from 1989 to 1990 was 70% of the overall decrease during the 1990 and 1991 fiscal years. The drop in yacht production was the most significant portion of the 1991 decrease in light of the 40% manpower reduction that took place at Merritt Island and Palm Coast. There were two significant corporate events that must be measured separately.

When the terminations are measured in two phases the reductions in work force are 15.9% in 1989-1990 and 27.9% in 1990-1991. The 15.9% reduction is within the rule of thumb that terminations below 20% cannot constitute a partial termination. The 27.9% rate of terminations for 1990-1991 do exceed the 20% safe-harbor. However, there is no evidence that the reduction in workforce was the result of anything but a downturn in the economic cycle. As such there is no evidence that the anti-abuse considerations of the statutory, regulatory or case law would apply. Therefore, the sliding scale of percentage should be applied.

Since there is no abusive character to the terminations the sliding scale approach would find the 27.9% rate for 1990-1991 insufficient for a finding of partial termination, particularly in light of the previous low percentage of 34% cited in *Tipton & Kalmbach, Inc. v. Commissioner*, supra. It should also be noted that the 34% of *Tipton* was sustained with a second year termination rate of 51%. In this case the termination rates are a consecutive 15.9% and 27.9%. The two year termination rate of 36.7% compares favorably with the one year termination rate in *Tipton*.

Therefore, Class II respectfully submits that a partial termination of the Plan did not occur during the time frame July 1, 1989 to June 30, 1991. As such the determination of the Committee that a partial termination had not occurred was correct and within the standards of applicable law.

## V. STANDARD OF REVIEW

Class II adopts the arguments and position of Plaintiffs with respect to the appropriate standard of review.

## VI. CONCLUSION

Based on the conclusions of law and fact contained herein, Class II defendants respectfully request that this Court grant the cross-motions for summary judgment filed by Class II and by Plaintiffs and deny the Class I defendants motion for summary judgment.

Respectfully submitted,

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